93-323

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

IN RE GRAND JURY PROCEEDINGS

EDWARD LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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QUESTION PRESENTED

Whether, consistent with the principles of the Due Process Clause of the Fifth Amendment of the United States Constitution requiring that government promises and agreements which induce cooperation by witnesses be enforced strictly, the government must be held to an agreement with a witness which arose by virtue of the government's statements and conduct (rather than by a written or oral express contract), when such statements and conduct induced the witness to cooperate extensively with the government beyond merely giving grand jury and trial testimony.

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EDWARD LEWIS,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The Petitioner, Edward Lewis, respectfully petitions this Court to issue a Writ of Certiorari to review the Order of the United States Court of Appeals for the First Circuit entered on May 27, 1993.

OPINIONS BELOW

The Opinion of the Court of Appeals for the First Circuit, the review of which is sought by this petition, is unreported and is reprinted in the appendix attached hereto. (A1).[1]

The unreported decision on April 29, 1993 of the United States District Court for the District of Massachusetts and the dictated finding of the District Court entered on April 28, 1993 are printed in the appendix attached hereto. (A10, A20).

JURISDICTION

The Memorandum and Order of the United States Court of Appeals for the First Circuit, the review of which is sought herein, was entered on May 27, 1993. (A1). On June 1, 1993, the United States Court of Appeals for the First Circuit denied the Petitioner's Request for a Rehearing. (A23).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fifth Amendment to the United States Constitution which is produced in full in the appendix attached hereto. (A24).

This case also involves the enforcement of immunity agreements pursuant to 18 U.S.C. § 6002 and § 6003, and the confinement of a recalcitrant witness pursuant to 28 U.S.C. § 1826. The statutes are produced in full in the appendix attached hereto. (A25, A26, A27).

[1] References to the Appendix filed in this matter will appear as "(A___)."

STATEMENT OF THE CASE

The witness, Mr. Edward Lewis, was found in contempt by the District Court on April 28, 1993, for refusing to answer questions relating to the payment of "rent"[2] during a United States Grand Jury proceeding. (A16). The United States District Court for the District of Massachusetts had jurisdiction over this matter pursuant to 28 U.S.C. § 1826 as it involved a witness testifying before a grand jury of the United States. (A27). On May 27, 1993 the United States Court of Appeals for the First Circuit affirmed the District Court's order. (A8).

This matter involves the testimony of Mr. Edward Lewis, a 73 year old gentleman, who has provided assistance and testimony to the government in an ongoing investigation for approximately five years. On or about July 27, 1987, the government served a witness subpoena upon Edward Lewis to testify before a Grand Jury. (A46). Thereafter, Mr. Lewis, through his attorney, Morris M. Goldings, notified the Assistant United States Attorney, ("Assistant U.S. Attorney") Mitchell D. Dembin, that Mr. Lewis intended to assert his privilege against self-incrimination pursuant to the Fifth Amendment of the United States Constitution. (A33, ¶3). In response, Assistant U.S. Attorney Dembin informed Mr. Lewis through counsel that he intended to seek immunity for Mr. Lewis. (A33). An immunity order was obtained on December 15, 1987. (A28).

In addition to the testimony that would be offered as a result of the immunity order, the parties discussed Mr. Lewis's assistance to the government in its investigation of gambling matters. (A33, ¶3; A46; A47). Mr. Dembin was informed that Mr. Lewis would not answer questions, either during testimony or informal interviews, regarding "rent." (A33-A34, ¶6; A47). Mr.

[2] The term "rent" as defined by the District Court refers to protection payments often paid by gamblers. (A2).

Dembin agreed that the government would not question Mr. Lewis about the issue of his "payment of rent" or "to whom he may have paid rent." (A33-A34, ¶6). Mr. Dembin made this agreement knowing "that the Organized Crime Strike Force was investigating allegations that bookmakers were being required to pay rent to various organized crime figures." (A33, ¶5).

Mr. Lewis appeared before the Grand Jury on or about January, 1988. (A49). In addition, Mr. Lewis provided information to the government through Mr. Dembin about the gambling industry to assist with the government's investigation. (A49). In compliance with its agreement, the government did not question Mr. Lewis on the issues of rent during the grand jury proceeding or the government interviews. (A34, ¶6, ¶7; A49).

Mr. Lewis was again subpoenaed on or about December 17, 1990 to appear before a United States Grand Jury. (*See* A72-A73). At that time, Mark W. Pearlstein was the Assistant U.S. Attorney handling the Lewis matter. (A49). The government obtained another immunity order on January 3, 1991, for Mr. Lewis's testimony. (A30). By its terms, the Court order regarding immunity required Mr. Lewis to testify in court. (A30). The Court order did not require Mr. Lewis to participate in informal informational interviews conducted by the United States Attorney's Office. (A30).

In addition to providing testimony for which Mr. Lewis had immunity, Mr. Lewis assisted the government once again, this time through Mr. Pearlstein, by providing a voluminous amount of information at informal interviews. (A51-A52). Mr. Pearlstein knew that Mr. Dembin had refrained from asking questions relating to rent in the investigation. (A37, ¶5). At all times, Mr. Pearlstein acted consistently with the agreement and did not question Mr. Lewis regarding the issue of rent or to whom rent was paid. (A37, ¶4).

On or about February 13, 1992, Mr. Lewis again appeared before a Grand Jury and was subject to questioning by Assistant

U.S. Attorneys Brian T. Kelly and Fred M. Wyshak. (A50; A51).

During this appearance before the Grand Jury, Mr. Lewis *was* questioned about "rent" for the first time by the government in violation of the government's agreement. (A64). At that time, Mr. Lewis testified that he did not pay "rent." (A64). Also at that time, he defined "rent" as he understood it. (A66). Counsel for Mr. Lewis was not informed by either Mr. Lewis or by the Assistant U.S. Attorneys that any question or questions on the subject of rent had been asked or that answers were given at that time.

Subsequently, in January, 1993, Mr. Lewis testified in the United States District Court for the District of Massachusetts in the trial of *United States* v. *London*, U.S.D.C. No. 90-10079-WF. (A68). Mr. Lewis testified that he did not pay rent to specified persons while under direct examination by Michael Kendall, Assistant U.S. Attorney. (A68).

On January 29, 1993, the government, through Assistant U.S. Attorney Kendall, informed Mr. Lewis's attorney that it had recently learned that it had reason to doubt the truthfulness of Mr. Lewis's testimony, both before the Grand Jury and at the London trial, that he did not pay rent. (A4). Counsel, after inquiry with his client, acknowledged that the prior testimony on this issue was incorrect. (A4). As a result of this exchange between counsel, Mr. Lewis was recalled to the stand in the London case to answer questions regarding rent. (A4). At that time, acknowledging the incorrectness of his prior trial testimony, Mr. Lewis answered several questions on direct and cross-examination as to persons to whom he did *not* pay rent but he refused to answer questions as to the identity of persons to whom he did pay rent. (A4). The question was subsequently withdrawn by counsel. (A4).

On April 8, 1993, Mr. Lewis was subpoenaed and appeared before the United States Grand Jury for the District of Massa-

chusetts. (A39). Mr. Lewis was advised of the January, 1991 order of this Court granting immunity, and was asked questions by the Assistant U.S. Attorney regarding rent. Mr. Lewis refused to answer the questions and stated his reasons for his refusal to answer the questions. (A39). These reasons were: (1) that Mr. Lewis's answers may tend to incriminate him in violation of his rights under the Fifth Amendment of the United States Constitution notwithstanding the immunity grant which had been asserted by the Government; (2) requiring Mr. Lewis to answer the question posed was in violation of an understanding which he had reached with the United States in 1988 that the question posed would not be asked by the United States as part of the grand jury or court proceedings for which he had been subpoened; (3) the question posed to Mr. Lewis was not asked for a purpose which was authorized by the grant of immunity which had been asserted by the Government.

It was from these April 8, 1993 proceedings that the government requested an order of contempt from the District Court. (A39). On April 28, 1993, the Court conducted an evidentiary hearing on the United States' Petition for Contempt (A38-A84) and dictated its findings and rulings. (A10-A19). On April 29, 1993, the Court (Wolf, J.) issued a written Order granting the Petition for Contempt and stayed the Order pending disposition of the Appeal. (A20). After affirmance by the United States Court of Appeals for the First Circuit of the District Court's finding of contempt, on June 8, 1993, Mr. Lewis was given an opportunity to recant and answer the questions presented by the government. However, consistent with Mr. Lewis's understanding of his agreement with the government, he refused to answer. The Court revoked bail and Mr. Lewis was incarcerated on June 8, 1993.

REASON FOR ALLOWANCE OF THE WRIT

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO DETERMINE THE IMPORTANT ISSUE OF CONSTITUTIONAL LAW OF WHETHER THE UNITED STATES ATTORNEY'S OFFICE, IN ACCORDANCE WITH DUE PROCESS PRINCIPLES, WILL BE HELD TO AN AGREEMENT IMPLIED BY ITS WORDS AND CONDUCT.

The issue presented in this case is important to the public in that it involves the standard of conduct to which the United States Attorney's Office must be held when dealing with and making agreements with witnesses in criminal cases, agreements which directly affect the rights accorded to individuals in the United States Constitution. Here a witness gave valuable information to the government, information which aided the government in its criminal investigation and which the government would not otherwise have obtained, in exchange for the government's agreement to refrain from questioning the witness about rent. Certiorari is appropriate where, as here, an issue is important to the public as distinguished from the parties. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 391 (1923). For example, certiorari was granted when a witness refused to answer questions before a congressional committee, when such refusal implicated the witness's First Amendment rights. *Yellin* v. *United States*, 374 U.S. 109 (1963). Similarly, where a witness appeared before a "one-judge-grand-jury" and refused to answer questions, and subsequently the same judge presided at the contempt hearing in which the witness was held in contempt for such refusal, certiorari was granted. *In re Murchison*, 349 U.S. 133 (1955). As in this case, these cases presented constitutional issues relating to the government's conduct toward witnesses which impacted all those who would similarly come into contact with the government.

Specifically, through numerous statements and actions, the government consistently conducted itself toward Mr. Lewis in accordance with its agreement to refrain from questioning Mr. Lewis about rent. This conduct induced Mr. Lewis to provide cooperation that he was under no obligation to give. This conduct by the government also created and evidenced a contract between Mr. Lewis and the government. *Anisgard* v. *Bray*, 11 Mass. App. Ct. 762, 729-730, 419 N.E.2d 315, 318 (1981); *see* Part I, *infra*. When the government induces such cooperation by an agreement it must be strictly held to its agreement. *See Santobello* v. *New York*, 404 U.S. 257; *see* Part II, *infra*. To ignore the government's statements and conduct, which took place over the course of five years, and were consistent with an agreement, unjustly enriches the government to the witness's detriment. As the government has now reneged on its agreement after acting within the agreement and accepting the benefit of Mr. Lewis's cooperation for five years, certiorari must be granted to determine whether this conduct by the government is within the principles of due process.

I. THE CONDUCT OF THE GOVERNMENT AND THE WITNESS AMOUNT TO A CONTRACT IMPLIED IN FACT TO REFRAIN FROM QUESTIONING THE WITNESS CONCERNING RENT

As a matter of contract law,[3] a contract between two parties may be implied by the conduct of the parties. *Anisgard* v. *Bray*,

[3] In this matter the Petitioner relies on Massachusetts contract cases because when a federal claim is based upon contract principles, the contract law of the forum state applies. *See Cloud* v. *Trustee of Boston University*, 720 F.2d 721, 724 (1st Cir. 1983). Massachusetts contract law applies in this matter. *See id.* However, the doctrine of implied-in-fact contracts is generally the same across the jurisdictions. *See* John D. Calamari and Joseph M. Perillo, CONTRACTS §§ 1-12 (3d Ed. 1987).

11 Mass. App. Ct. 726, 729-730, 419 N.E.2d 315, 318 (1981); *Day* v. *Caton*, 119 Mass. 513, 515 (1876). "If a party . . . voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request," a contract between the parties may be inferred. *Day*, 119 Mass. at 514. The party conferring the services must act with the expectation that the accepting party will compensate him or her for those services. *Zemier & Co. Inc.* v. *Beacon Invest. Assoc. Inc.*, 232 Mass. 507, 509, 122 N.E. 719 (1919). However, it does not matter whether the accepting party actually intended to form a contract; if the accepting party reasonably should have known from the circumstances that a contractual relationship had been formed, then the courts will recognize such a relationship. *Spencer* v. *Spencer*, 181 Mass. 471, 473, 63 N.E. 947, 948 (1902); *Hobbs* v. *Massasoit Whip Co.*, 158 Mass. 194, 197, 33 N.E. 495, 495 (1893). Moreover, a party's motives for acting within an implied agreement are irrelevant to whether the agreement was made. *Spencer*, 181 Mass. at 473, 63 N.E. at 948; *Hobbs*, 158 Mass. at 197, 33 N.E. at 495.

If one thing is clear in this matter, it is Mr. Lewis's absolute, unequivocal and explicit intention not to testify or respond to questions regarding the payment of rent. (A52, A55, A57-A59 and A71). Moreover, the government knew or reasonably should have known that Mr. Lewis expected that the government would not ask him questions concerning rent. (A48). Indeed, Assistant United States Attorney Mitchell Dembin admits that he agreed not to question Mr. Lewis about rent. (A33-A34, ¶6). Moreover, Mr. Pearlstein knew of Assistant U.S. Attorney Dembin's agreement and acted in accordance with it by not questioning Mr. Lewis about rent. (A37, ¶4, ¶5).

In exchange for the government's refraining from questioning Mr. Lewis about rent, Mr. Lewis educated the government

about the gambling industry and became, in essence, the government's "expert" on gambling practices. (A49; A51-A52; A55). The government knew that Mr. Lewis was providing it with a voluminous amount of significant information on gambling practices during hours of interviews. (A51-52, A58). Despite the "Chinese Wall" the government attempts to maintain between the Organized Crime Strike Force and the remainder of the United States Attorney's Office, from his first interview with Mr. Dembin and throughout the interviews which the government conducted with Mr. Lewis, the government knew that the Organized Crime Strike Force was investigating payments of rent by bookmakers. (A33, ¶5). Mr. Dembin and Mr. Pearlstein were aware of the Strike Force's work and do not deny that the testimony relating to rent was relevant to the Strike Force's investigation. (A33, ¶5). Indeed, the government accepted and benefitted from Mr. Lewis's information, without voicing a single objection to Mr. Lewis's refusal to answer questions concerning rent. (A33, ¶7; A37, ¶6).

Moreover, the information provided in these interviews was information about the gambling industry in general and not specifically related to Mr. Lewis's testimony at any proceeding. (A51-A52; A58). The immunity orders issued by the court, by their own terms, apply only to compel testimony by Mr. Lewis in Court. (A28-A29; A30-A31). The orders did not and do not apply to compel Mr. Lewis to provide information to the government at informal meetings.

Although the government claims that it agreed and did not object to Mr. Lewis's refusal to testify about rent because it did not want to embarrass Mr. Lewis, the facts and circumstances govern this matter, not the intention of the government. In this case, government's outward conduct and the reasonable inference which arose from its conduct — that it knew Mr. Lewis expected it to refrain from questioning him regarding rent in exchange for his cooperation — and its failure

to object to such an expectation and its acquiescence to Mr. Lewis's wishes establishes an implied contract between the parties. *Spencer*, 181 Mass. at 473, 63 N.E. at 948; *Hobbs*, 158 Mass. at 197; 33 N.E. at 495.

The government accepted the services Mr. Lewis performed, knowing what Mr. Lewis expected in return, and knowing that information about rent was relevant to the Strike Force investigation. Because the government failed to object to Mr. Lewis's expectation, and actually agreed to not question Mr. Lewis about rent, an agreement exists between Mr. Lewis and the government which must be enforced.

II. IN ACCORDANCE WITH THE DUE PROCESS CLAUSE, AGREEMENTS WITH THE GOVERNMENT, WHETHER EXPRESS OR IMPLIED, MUST BE ENFORCED

It is well established that agreements made between the government and a party are subject to general principles of contract law and may include remedies for specific performance. *Santobello* v. *New York*, 404 U.S. 257 (1971) (the state failed to keep a commitment concerning the sentencing recommendation on a guilty plea); *United States* v. *Canada*, 960 F.2d 263 (1st Cir. 1993) (Government's conduct amounted to non-performance of its plea agreement; breach of a plea agreement will be remedied by specific performance or the opportunity to withdraw the guilty plea); *United States* v. *Pelletier*, 898 F.2d 297 (2d Cir. 1990) ("To secure a Defendant's cooperation, the government may informally grant him use immunity for his cooperation. Since a cooperation/immunity agreement is in the nature of a contract, its effect is strongly influenced by contract law principles.").

Indeed, promises made by the government are subject to a higher level of scrutiny by the Court on the basis of due process and applicable principles of justice and fairness. *United States*

v. *Pelletier*, 898 F.2d 297, 302 (2nd Cir. 1990) ("Unlike the normal commercial contract, however, due process requires that the government adhere to the terms of any plea bargain or immunity agreement it makes."). In addition, courts have made no distinction among the varied types of agreements which government agents may make when evaluating the terms and enforceability of those agreements. *See Matter of Doe*, 410 F.Supp. 1163 (E.D. Mi. 1976) (Government promise to Grand Jury witness enforced).

Moreover, agreements between the government and a party remain effective despite a change in government agents and despite the passage of time. *See Giglio* v. *United States*, 405 U.S. 150 (1972); *Santobello* v. *New York*, 404 U.S. 257 (1971). In *Giglio*, 405 U.S. at 154 (1972), an Assistant U.S. Attorney's promise not to prosecute was held to be attributable to the United States, *regardless* of whether the Assistant U.S. Attorney had authority to make such a promise and regardless of whether that promise had been communicated to other Assistant U.S. Attorneys. This Court reasoned:

> In the circumstances shown by this record, neither [Assistant U.S. Attorney] DePaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. *The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.* See Restatement (Second) of Agency Section 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial Section 2.1(d). To the extent this

> places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Giglio, 405 U.S. at 154. (Emphasis added).

In *Santobello* a prosecutor's promise to make no sentence recommendation was enforced though the prosecutor who appeared at the sentencing did not know of the prior agreement made with another prosecutor, and the sentencing judge said the recommendation made no difference. This Court pointedly noted:

> It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of the agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of "letting the left hand know what the right hand is doing" or has done. That the breach of agreement was inadvertent does not lessen its impact.

Santobello, 404 U.S. at 263. Just as an express agreement is enforceable in accordance with due process principles, the agreement with Mr. Lewis, which is implied in fact by the government's statements and conduct, must be enforceable in accordance with due process principles. As in any agreement the government makes with a witness, the government received many benefits from Mr. Lewis's cooperation. Moreover, Mr. Lewis's cooperation was induced by the government's statements and conduct. When cooperation by a witness is induced by the government, due process demands that the promise which induces the cooperation be fulfilled. *Santobello*, 404

U.S. at 263. The government must be held to the agreement to refrain from questioning Mr. Lewis regarding rent, regardless of the fact that this agreement is implied by the statements and conduct of the government, rather than the result of an express promise.

Moreover, the government's agreement is enforceable against the entire United States Attorney's office as an entity. Assistant U.S. Attorney Dembin specifically agreed to refrain from questioning Mr. Lewis about rent knowing "that the Organized Crime Strike Force was investigating allegations that bookmakers were being required to pay rent to various organized crime figures." (A33, ¶5). Despite the fact that the United States Attorney's Office knew that testimony relating to rent was relevant to the strike force investigation, none of the Assistant U.S. Attorneys objected to Mr. Lewis's statements regarding his intentions to refuse to answer questions regarding rent. It is the responsibility of the United States Attorney's Office to communicate internally before an agreement of this nature is made so that they may determine whether such an agreement affects other ongoing investigations. The members of the Strike Force cannot now assert that they are distinct from the United States Attorney's Office and not bound by agreements made by it. (*See* A81-A83). The government's agreement with Mr. Lewis binds the government as an entity, including the Strike Force, and must be enforced.

Although the District Court found that there was no express agreement between the government and Mr. Lewis, there has been no analysis or consideration of whether the government's conduct in this matter amounted to a contract implied in fact between the parties. Contrary to the reasoning of the First Circuit, as matter of law, the District Court could not have relied on the government's stated intentions for refraining from questioning Mr. Lewis in finding that an agreement did not exist in this matter. (*See* A5). When a contract arises by virtue

party's conduct the intention of the receiving party is *irrelevant* as to whether a contract was formed. *Spencer* v. *Spencer*, 181 Mass. 471, 473, 63 N.E. 947, 948 (1902); *Hobbs* v. *Massasoit Whip Co.*, 158 Mass. 194, 197, 33 N.E. 495, 495 (1893).

Furthermore, if a factual determination is made to the effect that the government's conduct resulted in such an agreement, it is well established as a matter of due process that the government will be held strictly to that agreement. *Santobello* v. *New York*, 404 U.S. 257 (1971). Indeed, the United States Court of Appeals for the First Circuit did not rule otherwise. "If the government in exchange for cooperation bound itself not to ask appellant any further questions about rent, then under the case law he was not obliged to answer." (A9). Because of the important implications of this matter, it is essential that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

CONCLUSION

For the foregoing reasons and authorities, the Appellant respectfully requests that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals for the First Circuit.

No. 93-1485.

IN RE: GRAND JURY

JOHN DOE,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Mark L. Wolf, U.S. District Judge]

Before
Selya, Boudin and Stahl,
Circuit Judges.

Morris M. Goldings, *Alice E. Moore*, and *Mahoney, Hawkes & Goldings* on brief for appellant.

A. John Pappalardo, United States Attorney, *Fred M. Wyshak, Jr.* and *Brian T. Kelly*, Assistant United States Attorneys, on brief for appellee.

May 27, 1993

Per Curiam. Appellant has appealed from an order of the district court holding him in civil contempt for refusing to testify as a witness before a grand jury. *See* 28 U.S.C. § 1826(a). The district court granted appellant's request for bail pending appeal, finding that the appeal was not frivolous or taken for delay. *Id.* § 1826(b).

I.

Appellant's relationship with the government began in July 1987 when he was served a subpoena to testify before a grand jury investigating money laundering, particularly in relation to Heller's Cafe and Michael London. Appellant, through his attorney, informed the government that he intended to assert his Fifth Amendment right against self-incrimination. The government then obtained an order of immunity under 18 U.S.C. §§ 6002 and 6003.

Prior to appearing before the grand jury, appellant and his attorney met informally with Mitchell Dembin, the assistant United States Attorney in charge of the investigation, and other law enforcement officers. At this pre-grand jury meeting, appellant's attorney advised Dembin that appellant would refuse to answer any questions — either informally or before the grand jury — regarding the payment of "rent."[1] Appellant did provide, on an informal basis, other information about general gambling practices directly to Dembin.

According to Dembin's affidavit submitted to the district court, he had stated to appellant that he would not ask appellant any questions concerning rent before the grand jury or inquire into the identities of those running the bookmaking organiza-

[1] According to the district court, "rent" is a term used to refer to extortionate payments that bookmakers have, at times, been required to make to certain organized crime figures.

tion for which appellant then worked. Dembin asserts, in the affidavit, that he had made this decision on the ground that the "circumstances of [appellant's] 'rent' and his current employment situation appeared to be beyond the scope of the Heller's Cafe investigation." Consequently, Dembin did not ask about rent when appellant appeared before the grand jury in early January 1988. It is undisputed, however, that Dembin was aware that the Organized Crime Strike Force was then investigating allegations that certain organized crime figures were requiring bookmakers to pay rent to them.

In December 1990, appellant received a second subpoena to appear before a grand jury. At this time, Mark Pearlstein was the assistant United States Attorney involved with the grand jury proceedings. He was investigating a check-cashing business suspected of money laundering on behalf of bookmakers. A second immunity order was obtained. Appellant again met with prosecutors on an informal basis and provided them with information concerning betting practices and procedures. In his affidavit, Pearlstein acknowledges that he was aware that Dembin had refrained from asking appellant about rent. He followed the same path because the subject of rent payments "was of little direct relevance to the investigation" he was conducting. Accordingly, when appellant appeared before the grand jury in January 1991, he was not asked about rent.

In February 1992, appellant made a third appearance before a grand jury. According to appellant, he was informed that this was the same grand jury before which he had appeared in 1991. This time, the two United States Attorneys who questioned appellant were connected to the Strike Force and were investigating the payment of rent. As a result, appellant was questioned on this subject; he testified that he did not pay rent. Appellant did not mention, during this grand jury appearance, any agreement or promise by the government that he would not be asked such questions.

Also, in January 1993, appellant testified at the trial of Michael London. Before giving his testimony, he met with the prosecutors for five to eight hours and answered many inquiries concerning betting practices and procedures; nonetheless, he was not questioned about rent. At trial, however, appellant was asked by the prosecution whether he paid rent to certain individuals. He stated, as he had before the grand jury, that he did not pay rent. After it was learned that appellant had given false answers concerning rent payments (both at the 1992 grand jury and the *London* trial), appellant was recalled to the stand in the *London* trial. He then admitted that he had given incorrect information, but declined to identify anyone to whom he had paid rent.[2] He again did not mention any agreement to the effect that he did not have to answer such questions.

II.

This bring us to the present. Appellant, on April 8, 1993, appeared for the fourth time before the grand jury. Again, this grand jury proceeding was represented as a continuation of the prior grand jury investigations.[3] Appellant now refused to answer any questions concerning rent. Upon the government's petition for contempt, the district court held a hearing at which appellant testified. He asserted that his refusal to testify was based on an agreement between himself and the government that he would never have to answer questions relating to the payment of rent as long as he continued to answer questions concerning gambling practices in general.

[2] According to the government, appellant was not held in contempt because the question was withdrawn by London's counsel.

[3] To avoid any problems with the validity of the prior immunitty orders, a new order was entered on April 28, 1993.

The district court judge made several findings. First, he determined that appellant had met informally with Dembin prior to testifying before the grand jury, even though the immunity order did not require such a meeting, because it was in his best interests to do so. The judge acknowledged Dembin's statement that he would not question appellant about rent. He concluded that "Dembin did not promise [appellant], however, that those questions would never be asked of [appellant] before any future Grand Jury."

Second, the judge accepted the explanation that Dembin was merely being "prudent," seeking to get answers relevant to his investigation without the time-consuming delays of litigation. The judge further held that

> in January, 1988, [appellant] may well have had a hope that he would never be asked about rent. I also find, however, that he did not then believe, and in any event could not have reasonably believed that he had an agreement or assurance that he would never be asked about that subject.

As for Pearlstein, the judge determined that he had acted with the same motives as Dembin because, like Dembin, he was interested in money laundering, not rent. As such, he also had sought the most efficient way to secure the information he needed. Thus, the judge found, Pearlstein had not, through his conduct, "recognize[d] or create[d] any agreement that the Government would not ever ask [appellant] . . . questions [about rent]."

Based on the foregoing, the judge concluded that there was no agreement between the government and appellant that he would never be asked about rent. He pointed out that appellant had never raised the existence of any such agreement when he was asked about rent at the 1992 grand jury, nor did he

attempt to consult with his attorney even though his attorney was present outside the jury room. Appellant's failure to mention the agreement at the *London* trial also belied his claim that an agreement concerning rent then existed. Finally, the judge determined that appellant "did not rely to his detriment or give any consideration for the purported agreement he now seeks to rely on."

As for appellant's claim that his informal cooperation with the government — supplying information outside of the grand jury — constituted adequate consideration, the judge declared:

> It is often the case that a witness compelled to testify will meet with his counsel and the Government before testifying because it has the potential to make his Grand Jury testimony or trial direct and cross-examination testimony proceed more smoothly. I find that is essentially what occurred in this case.

Because appellant failed to establish a sufficient reason for his refusal to answer the questions concerning rent, the judge granted the government's petition for contempt.

III.

Whether the conduct in this case constituted contempt turns on a simple issue. If the government in exchange for cooperation bound itself not to ask appellant any further questions about rent, then under the case law he was obliged to answer. Such commitments, where they are made, are treated as akin to contracts and construed under contract law principles. *United States* v. *Pelletier*, 898 F.2d 297, 301 (2d Cir. 1990); *United States* v. *Hogan*, 862 F.2d 386, 388 (1st Cir. 1988). Indeed, "due process requires that the government adhere to the terms of any . . . immunity agreement it makes." *Pelletier*, 898 F.2d

at 302. Where the terms of an agreement are not clear because, for example, there is no written contract, the court's "task [is] to construe the words used to try, if possible, to carry out the intention of the parties in light of all the facts and surrounding circumstances. . . ." *In re Wellins*, 627 F.2d 969, 971 (9th Cir. 1980).

In this case, the district court found as facts that the government in the initial grand jury sessions chose not to question appellant about rent but never promised appellant permanent immunity from such questions. Further, the district court found that appellant himself did not believe that he had been given any such promise of permanent immunity. Findings of fact by the district court, in contempt proceedings as elsewhere, are reviewed under a deferential standard and will not be set aside unless clearly erroneous. See Fed. R. Civ. P. 52(a).

The district court's findings are amply supported by the evidence. There was no written agreement; appellant himself failed to recollect, even by his own account, the precise wording that he now claims to have amounted to a binding commitment; and appellant's failure to invoke any such supposed agreement when questioned at the 1992 grand jury session thoroughly undercuts his present claim. These facts support the finding that there was no commitment, hence no justification for appellant's failure to testify.

Given the inherently factual nature of issues like this one, there is no reason to address at length the authorities cited by appellant, which are in any case distinguishable. In *In re Wellins*, for example, the government was found to have obtained cooperation by an agreement that Wellins' cooperation would not be revealed; and the court enforced that agreement. 627 F.2d at 971. Similarly in *In re Doe*, 410 F.Supp. 1163 (E.D. Mich. 1976), a witness turned over drugs following a promise that he would not be further questioned about them and the court held the government to its commitment.

If appellant in this case had a comparable agreement, it too would be enforced, but appellant has not proved such an agreement. Absent an agreement, the contempt is patent and the order under review is *affirmed*. Appellant's motion for oral argument is denied.

APPENDIX B.

United States Court of Appeals for the First Circuit.

No. 93-1485.

IN RE: GRAND JURY

JOHN DOE,
APPELLANT.

ERRATA SHEET

The opinion of this Court issued on May 27, 1993 is amended as follows:

Page 7, III, Line 2: Sentence should read "If the government in exchange for cooperation bound itself not to ask appellant any further questions about rent, then under the case law he was not obliged to answer."

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In Re: Grand Jury Matter : MC 91-10007

Before: Hon. Mark L. Wolf
United States District Judge
Boston, Massachusetts

Courtroom No. 4
Post Office and Courthouse
Boston, Massachusetts
April 28, 1993

DICTATED ORDER.
[Pages 67 - 73.]

[67] no agreement. He had nothing upon which he could rely. And, at that time he thought that — I mean he couldn't look in a crystal ball and know what was going to happen with Mr. Krantz. And, he thought he could get away with it.

And I suggest if he really had an enforceable contractual agreement with the Government, he would have relied upon it at that time when he was represented by Mr. Goldings. I have nothing further to say, your Honor.

THE COURT: Well, I am going to take a recess and we will resume when I reach a decision, which I hope will be within the next ten minutes or so.

THE CLERK: All rise for the Honorable Court.

(Recess)

THE CLERK: All rise for the Honorable Court.

You may be seated.

THE COURT: The submissions, the evidence and the arguments that I have received have all been very beneficial and I think the factual issue on which this turns is quite focused and I am able to address it now.

The transcript of these remarks will be the most detailed record of my reasons. I will, however, issue a summary order memorializing the conclusion. And, for reasons that I will now explain the petition for contempt is hereby [68] allowed.

Essentially Edward Lewis was a witness who was called to testify before a duly impaneled United States Grand Jury of the District of Massachusetts on April 8, 1992. Mr. Lewis appeared before the Grand Jury with his counsel present outside the Grand Jury room. He was provided with an order of this court dated January 3, 1991 compelling him to testify and produce evidence with respect to all matters under inquiry by the Grand Jury. For present purposes, I find that was an order that remained effective because the new Grand Jury was ancil-

lary to the Grand Jury in connection with which it was originally issued, but that issue has in effect been taken out of the proceeding because I have today issued a new compulsion order which Mr. Lewis through his counsel accepts as valid.

Mr. Lewis, despite the compulsion and immunity order refused to answer certain questions, particularly questions concerning to whom he paid rent when he was a bookmaker. Rent is a euphemism for extortionate payments that bookmakers in the Greater Boston area have from time to time been required to make to Organized Crime figures in order to continue their illegal business.

I find by a preponderance of the evidence that there is no valid reason or just cause for Mr. Lewis to refuse to answer the questions at issue. And, his incarceration for **[69]** contempt, but no lesser sanction has the potential to comply with the order of protection.

The reasons for these findings are as follows: In essence I find that there was no agreement between the Government through its Assistant United States Attorney Michael Dembin and Mr. Lewis providing that the Government would never ask Mr. Lewis who he paid rent to.

Among the facts established by the evidence before me are the following: In about December of 1977, the Government obtained an immunity order from United States District Judge Douglas Woodlock compelling Mr. Lewis to testify before a Grand Jury and providing him with statutory immunity.

On January 21, 1988, Mr. Lewis and his attorney, Morris Goldings, came in to meet with Mr. Dembin and others for a pre-Grand Jury interview concerning an investigation of Michael London at Heller's Cafe. They came into that interview to speak with the Government informally because the immunity order did not require that Mr. Lewis paricipate in any interviews before there was any purported contract.

In other words, Mr. Lewis apparently on the advice of his counsel considered it to be in his interests to be interviewed for a period before going in front of the Grand Jury and before there was any alleged agreement that he would not be asked about rent or certain other subjects.

[70] In the course of the interview Mr. Lewis was asked whether he had paid rent or something relevant to that. Mr. Lewis refused to answer. He assured Mr. Dembin that Mr. London and Heller's Cafe were not involved in any rent that he may have paid. Mr. Dembin was satisfied that the issue of rent was not relevant to the investigation he was conducting, although he knew if might be of interest to the Organized Crime Strike Force which was investigating matters concerning rent.

Mr. Dembin said to Mr. Lewis and his attorney that he would not ask Mr. Lewis questions before the Heller's Cafe Grand Jury concerning rent. Mr. Dembin did not promise Mr. Lewis, however, that those questions would never be asked of Mr. Lewis before any future Grand Jury.

I find that Mr. Dembin was just being prudent and seeking to take the path that would get him the answers relevant to his investigation without generating time-consuming and delaying litigation on an issue not relevant to his investigation.

The Government, however, was, in January, 1988 entitled to Mr. Lewis' complete and truthful testimony before the Grand Jury, including testimony concerning the payment of rent since the compulsion order did not except any areas.

At this point and indeed subsequently there is no written document reflecting what is now alleged to have been **[71]** an agreement between Mr. Lewis and the Government, although Mr. Lewis was represented by able counsel who I find has been fully capable of seeking to memorialize any agreement which at that time was genuinely believed to have been reached.

I find that in January, 1988, Mr. Lewis may well have had a hope that he would never be asked about rent. I also find, however, that he did not then believe, and in any event could not have reasonably believed that he had an agreement or assurance that he would never be asked about that subject.

Subsequently, Mr. Lewis was called before another Grand Jury by Assistant United States Attorney Mark Pearlstein. Mr. Pearlstein was then conducting an investigation with money laundering. By virtue of being familiar with the file, he knew that Mr. Lewis did not wish to answer questions about the payment of rent, and that area was not relevant to his inquiry.

He, too, seeking to efficiently acquire the information relevant to him did not ask any questions about rent. But, Mr. Pearlstein's conduct did not recognize or create any agreement that the Government would not ever ask Mr. Lewis such questions.

On about February 13, 1992, the Assistant United States Attorney Fred Wyshak and Brian Kelly scheduled Mr. Lewis to appear before the Grand Jury as members of the **[72]** Organized Crime Strike Force. They were investigating the payment of rent. They met with Mr. Lewis before the Grand Jury appearance, and I find that they made Mr. Lewis aware that the issue of rent would be among the subjects on which he would be examined. But that finding, which Mr. Lewis denies, is not at all material to this analysis.

What is undisputed is that in the Grand Jury Mr. Lewis was asked whether he had paid rent. Mr. Lewis was accompanied to the interview and the Grand Jury by his attorney, Morris Goldings. Mr. Goldings was outside the Grand Jury room. Mr. Lewis knew that he had a right to go out and consult his counsel before answering any particular question. Mr. Lewis did not exercise his right to go out and talk to Mr. Goldings when he was asked if he ever paid rent. Mr. Lewis did not, himself, claim that this was some agreement that he would not

be asked about rent with the Government. Rather, he testified falsely that he had never paid rent.

Essentially the same scenario occurred at the trial of Michael London at which I presided in January, 1993. Mr. Lewis was asked by defense counsel on cross-examination whether he had paid rent. He did not seek to consult counsel; he did not claim there was some agreement that precluded inquiry in that area.

Initially he testified that he did not pay rent. **[73]** When the Government informed defense counsel that that appeared not to be true, there were some contempt proceedings begun but not completed. In the course of those contempt proceedings, there was no claim that there was some agreement that precluded questioning of Mr. Lewis about rent or, indeed, any reference to an agreement applicable to the Government even if it might not have been applicable to defense counsel. So, for those reasons I find that there was not an agreement between the Government and Mr. Lewis that he would never be asked about the payment of rent.

Although it is not essential to this analysis, I also find that Mr. Lewis did not rely to his detriment or give any consideration for the purported agreement he now seeks to rely on. And, I particularly find that he was not over time interviewed informally by the Government in addition to his compelled Grand Jury appearances because of a promise that he would not be asked about rent.

It is often the case that a witness compelled to testify will meet with his counsel and the Government before testifying because it has the potential to make his Grand Jury testimony proceed more smoothly. I find that that is essentially what occurred in this case.

In addition, I find there is no other just cause for Mr. Lewis refusing to answer. He told me that if I were to **[74]** find against him, he would decline to answer. He communicated

that respectfully to me. But this, of course, is not personal. He said he would decline to answer because he believes it is honorable to protect at least certain others. But, that does not constitute just cause. He is, to use the vernacular, a standup guy. But, if he is going to do that, he is going to do that in a local jail or federal prison.

The witness does not claim to be operating from fear. And, in any event, that would not constitute just cause. The Government would have an obligation to protect the defendant from any reasonable apprehension of harm that he would have for himself or his family. But such fear which doesn't exist here would not excuse him from testifying.

Now, the purpose of civil contempt is not punitive, it is coercive. And, Mr. Lewis says he will not testify. I believe, however, that even if I accept that, it is his present intention not to testify, he will change his mind after being incarcerated for contempt. So, when I said that if he wants to be a standup guy, he will have to stand up in jail, that is not talking about punitive, but it is talking about being placed in a setting which will give him time to reflect on whether he wants to by his terms continue to be an honorable man, indeed, perhaps one of the last honorable men.

Mr. Goldings made an oblique allegiance to some [75] newspaper articles. I don't rely on newspaper articles in deciding matters. But, I think the articles that Mr. Goldings was referring to referred to certain people now cooperating with the Government, including certain people that Mr. Lewis in the past and perhaps from a sense of honor has declined to give incriminating information about. Of course, I have a lot of exposure to this through my involvement in the London trial.

But, as a practical matter, times change, circumstances change and up to now Mr. Lewis has not had to bite the bullet, so to speak. But, now he has been held in civil contempt and he will be incarcerated and given an opportunity to reflect and I hope quickly change his mind.

Under the applicable rules of the Court of Appeals, the effective time and date of a contempt order has to be postponed 48 hours. It is my hope that I will get a written order out later today, although I have a number of other things scheduled. That order will tell Mr. Lewis when to report to the United States marshal, and I expect it will be sometime on Friday. It will be no later than Monday morning.

Is there anything further for today?

MR. GOLDINGS: Your Honor, in order to have — to invoke, I would file a notice of appeal based on the oral opinion and decision and also a motion for stay and for **[76]** admission for bail. And, I do request that you do grant the 48 hours, but those I wish to file at this time with your clerk, if I may.

THE COURT: Well, you may file them, but with regard to — why don't you file them.

May I have the motions, please?

Well, as a practical matter —

MR. GOLDINGS: I will give you a brief argument. Our position is found in Rule 9 which says that the district court shall allow bail unless the appeal appears frivolous. — and then the 48-hour provision which has been alluded to. But, I take the position and in our memorandum addresses the Court of Appeals Rule 9 which — to this Court that your Honor shall allow bail unless the appeal appears frivolous. And, I suggest that — this is not a frivolous appeal.

THE COURT: Well, as a practical matter, why is it not not frivolous? It seems to me that this decision that I have reached turns very much on findings of fact which only are rarely reversed by a Court of Appeals.

MR. GOLDINGS: Well, I think there is much to document by argument the agreement existed in fact. Well, more importantly, your Honor takes the position that my contention was that there was a contract that he would never have to testify. Your Honor used that word and I made note of it.

[77] Our position is that the documents and the evidence fairly reviewed showed that there was an understanding — and I say that it applies at least for the life of this Grand Jury on the examination on the issue of rent was one that was continuous.

THE COURT: That, as a practical matter, I could have addressed that more directly. But there are Statutes of Limitations on all of these offenses, and we are already talking now about something that happened at least five years ago. So, for practical purposes, there is no distinction between never and the Grand Jury is only authorized to investigate prosecutable crimes. If they were investigating only things, including a RICO Statute of Limitations, that can run for some time, that would probably be a better reason not to compel him to testify.

MR. GOLDINGS: And, it may be a termination of his period of compulsion if I get to that issue. And, if that is the case, then even though the Grand Jury may exist for another x months, to follow your Honor's reasoning, if a relevant statute that is reasonable that this be compelled beyond that, and that is something that would be addressed after he, if he ever started to serve. But, on the issue of frivolousness, our memorandum addresses the traditional issues. I do know that there is a case that says the unreality he is involved in asking is whether he is likely to [78] be reversed —

THE COURT: Well, as a practical matter, I didn't know how I was going to decide it — I had focused on this. I was determined knowing local rule 9 that Mr. Lewis would not go off today. We will have at least 48 hours and maybe I ought to get some response from the Government.

MR. WYSHAK: Well, Judge, I do believe that this appeal is a frivolous appeal and I believe that the only purpose served is to delay the incarceration of Mr. Lewis. I handled this before, but assuming for argument that there was a legitimate contract in 1987, and assuming that the Government was bound

by that contract, I don't believe that Mr. Goldings would ever argue that the contract applied to susequent criminal activity of Mr. Lewis committed after that period of time.

So, the forever, never, argument doesn't make any sense. It is the Government's intention to question Mr. Lewis about rent payments up until 1990 and through 1991. And, even if there was a contract back then, there can be no argument that the Government issued a contract which created a license for Mr. Lewis to engage in this activity that he attempted to shield him from questioning of. So, that argument to me is —

THE COURT: Are you suggesting that Mr. Lewis was paying rent after he testified before the Grand Jury?

[79] MR. WYSHAK: I certainly am. And, I could file an affidavit under seal if you would like that.

THE COURT: Well, it really goes to a decision that I already made without —

MR. WYSHAK: That is why I think that this forever and never issue is not a relevant issue.

THE COURT: Well, I am going to do the following: The Government hasn't had a chance to read Mr. Goldings' memorandum. If there is anything that you would like to bring to my attention, a case or two from the First Circuit, it doesn't have to be fancy, you can send it up to me later this afternoon. And, I expect that this order will be issued tomorrow morning. And, if that occurs, Mr. Lewis will have at least until Monday to report. And, I will reflect on whether this is frivolous within the meaning of the rule or not.

MR. GOLDINGS: Thank you, your Honor.

Court will be in recess.

THE CLERK: All rise for the Honorable Court.

Court is in recess.

(Recess)

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: GRAND JURY WITNESS
(Edward Lewis) M.B.D. No. 93-10296

ORDER

WOLF, D.J. April 29, 1993

This matter came before the Court on April 28, 1993 for a hearing pursuant to Title 28, United States Code § 1826, on the petition of the United States to hold Edward Lewis in civil contempt of a lawful Order of this Court. The United States was represented by Assistant United States Attorneys Frederick Wyshak and Brian Kelly. Edward Lewis appeared, represented by his attorney, Morris Goldings, Esq. After a hearing, the court makes the following findings based upon clear and convincing evidence.

1. Lewis is a witness who was called to testify before a duly impanelled United States Grand Jury of the District of Massachusetts.

2. On April 8, 1993, Lewis appeared before the Grand Jury, with his counsel present outside the Grand Jury room. Lewis was provided with an Order of this Court, dated January 3, 1991, compelling him to testify and to produce evidence with respect to all matters under inquiry by the Grand Jury.[1] Mr. Lewis, despite this Order, refused to answer certain questions.

[1] As counsel for Lewis acknowledged any potential dispute on the question of the validity of the January 3, 1991 Order, which was issued in connection with a prior Grand Jury, is moot because the court on April 28, 1993 allowed the government's application for another Order compelling Lewis to testify pursuant to 18 U.S.C. § 6001 *et seq*.

3. There is no valid reason, or just cause, for Lewis to refuse to answer the questions at issue and his incarceration for contempt, but no lesser sanction, has the potential to coerce his compliance with the Order compelling his testimony. The reasons for these findings were explained in detail at the hearing; the transcript of the hearing will constitute the record of this decision. These reasons are summarized as follows:

First, contrary to Lewis' contention, the government did not agree that Lewis would not in the future be questioned before a grand jury about the matters now at issue. Second, Lewis did not, in any event, provide any consideration for, or rely to his determent on, the purported, but not proven, promise by the government that he would not in the future be questioned about the matters now at issue. This case is, therefore, materially different from those on which Lewis relies. *Compare Matter of Doe*, 410 F.Supp. 1163, 1166 (E.D.Mi. 1976) (individual surrendered cocaine in reliance on a promise he would not be questioned); *Matter of Wellin*, 627 F.2d 969, 972 (9th Cir. 1980). Third, while Lewis may at present intend not to testify, the court believes he may change his mind after being incarcerated for contempt. *See In re Grand Jury*, 851 F.2d 499, 502 (1st Cir. 1988); *Simkin* v. *United States*, 715 F.2d 34, 37-38 (2d Cir. 1983).

It is therefore hereby ORDERED, pursuant to the provisions of Title 28, United States Code § 1826 that Edward Lewis shall be committed to the custody of the Attorney General for confinement at a suitable place until such time as he is willing to answer all questions put to him before the Grand Jury by an Assistant U.S. Attorney and members of the Grand Jury, or until the expiration of the term of the Grand Jury, including extensions, whichever shall occur first, but not to exceed 18 months.

Lewis has filed a notice of appeal of this decision. While this court does not view the appeal as meritorious, the appeal is

not frivolous; nor is it taken solely for delay. Thus, the foregoing Order that Lewis be confined is hereby STAYED, and Lewis shall be released on bail, upon the standard conditions and the posting of $10,000 surety, pending the disposition of his appeal. *See* 28 U.S.C. § 1826; Local Rule of Appellate Procedure 9.

UNITED STATES DISTRICT COURT

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1485

IN RE: GRAND JURY

JOHN DOE,
Appellant.

Before

Selya, Boudin and Stahl,
Circuit Judges.

ORDER OF COURT

Entered June 1, 1993

The petition for rehearing is denied. Mandate shall issue forthwith. The request for revocation of bail should be addressed to the district court.

By the Court:

Clerk.

(cc: Ms. Moore, Messrs. Goldings, Kelly, Wyshak II)
(Certified copy to District Court)

APPENDIX F.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G.

18 U.S.C.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incriminations, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House.

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derive from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

APPENDIX H.

18 U.S.C.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

APPENDIX I.

28 U.S.C.

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000 or both.

APPENDIX J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. M.B.D. No. 87-959

JOHN DOE

ORDER

This matter is before the Court on the application of the United States of America, through the United States Attorney, for an order instructing Edward Lewis to testify pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003.

Upon consideration of the application of the United States in the proceding before me, the Court hereby orders Edward Lewis to testify before a United States grand jury and subsequent thereto for the District of Massachusetts, and further orders Edward Lewis to answer fully such questions as may be put to him in connection with inquiry before the grand jury or any further proceedings resulting therefrom or ancillary thereto. Edward Lewis shall not be excused from testifying on the grounds that the testimony required of him may tend to incriminate him.

No testimony or other information compelled under this order or any information directly or indirectly derived from such testimony or other information, may be used against the witness, Edward Lewis, in any criminal case except a prosecution for perjury, giving false statements, or otherwise failing to comply with this order.

IT IS FURTHER ORDERED, as provided in 18 U.S.C. § 6002, that this order shall become effective only if, after entry of this order, Edward Lewis refuses to give testimony or to provide other information before the United States grand jury for the District of Massachusetts on the basis of his privilege against self-incrimination and this order is communicated to him.

If this order has become effective and Edward Lewis refuses to answer questions or to produce evidence before the United States grand jury, the Court will hear and receive a motion to hold Edward Lewis in contempt of this Court for disobedience of the Court's lawful order.

_____

UNITED STATES DISTRICT JUDGE

Dated: December 15, 1987

APPENDIX K.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: GRAND JURY PROCEEDINGS

M.B.D. No. 91-07

ORDER

This matter is before the Court on the application of the United States of America, through the United States Attorney, for an Order instructing EDWARD LEWIS to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003.

Upon consideration of the application of the United States in the proceeding before me, the Court hereby ORDERS EDWARD LEWIS to testify and produce evidence before the United States Grand Jury and subsequent thereto in the United States District Court for the District of Massachusetts notwithstanding his privilege against self-incrimination, and FURTHER ORDERS EDWARD LEWIS to answer fully such questions as may be put to him in connection with the Grand Jury inquiry or any further proceedings resulting therefrom or ancillary thereto. EDWARD LEWIS shall not be excused from testifying or from producing books, papers, or other evidence on the grounds that the testimony or evidence required of him may tend to incriminate him.

No testimony or other information compelled under this Order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness, EDWARD LEWIS, in any criminal case except a prosecution for perjury, giving false statements, or otherwise failing to comply with this Order.

It is FURTHER ORDERED, as provided in 18 U.S.C. § 6002, that this Order shall become effective ony if, after entry of this Order, EDWARD LEWIS shall refuse to give testimony or provide other information before the Grand Jury on the basis of his privilege against self-incrimination and this ORDER is communicated to him by the person presiding over the Grand Jury.

If this Order has become effective and EDWARD LEWIS refuses to answer questions or produce evidence before the Grand Jury, or the United States District court, the Court will hear and receive a motion to hold EDWARD LEWIS in contempt of this Court for disobedience of the Court's lawful Order.

UNITED STATES DISTRICT COURT

Dated this 3rd day of January, 1991, at Boston, Massachusetts.

APPENDIX L.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: GRAND JURY PROCEEDINGS
(EDWARD LEWIS) M.B.D. No. 93-

DECLARATION OF MITCHELL D. DEMBIN

I, Mitchell D. Dembin, under penalty of perjury, declare the following to be true, upon knowledge, information and belief:

1. I am an Assistant United States Attorney for the Southern District of California. From October 1985 until July 1989, I was an Assistant United States Attorney for the District of Massachusetts. As part of my duties while employed by the United States Attorney's Office in Boston, I supervised the investigation into the operations of Heller's Cafe and its principal, Michael B. London.

2. As part of the Heller's Cafe investigation, I caused a grand jury subpoena to be served upon Edward Lewis. Mr. Lewis had been identified as a bookmaker who had used the facilities of Heller's Cafe to cash and to launder the proceeds of his bookmaking activities. The checks cashed at Heller's Cafe, which related to Mr. Lewis, did not have Mr. Lewis' name upon them. Rather, as was the standard course of business at Heller's Cafe, an identifying code was placed somewhere on the check by Mr. London or someone in his employ. Accordingly, testimony was sought from Mr. Lewis regarding the transactions which produced the checks negotiated through Heller's Cafe, the manner in which the checks were negotiated at Heller's Cafe, and the knowledge of Mr. London regarding the illegal genesis of the checks.

3. Following the service of the subpoena upon Mr. Lewis, I was contacted by Morris Goldings who represented himself to be Mr. Lewis' attorney. On or about July 28, 1987, Mr. Goldings advised me that if called to testify before the grand jury, Mr. Lewis would assert his Fifth Amendment rights against self-incrimination. Subsequently, I sought and obtained an order of immunity for Mr. Lewis pursuant to Title 18, United States Code, Sections 6001, *et seq.*, and so advised Mr. Goldings.

4. On or about January 21, 1988, by pre-arrangement with Mr. Goldings, Mr. Lewis appeared at the offices of the United States Attorney for a pre-grand jury interview. The interview was attended by Mr. Lewis, Mr. Goldings, me, and at least two law enforcement officers assigned to the Heller's Cafe investigation. With regard to his dealings and transactions with Michael London and Heller's Cafe, Mr. Lewis was forthcoming and his answers to questions appeared truthful when compared with other information previously obtained.

5. I was aware, at the time of the Lewis interview, that the Organized Crime Strike Force was investigating allegations that bookmakers in the Boston area were being required to pay "rent" to various reputed organized crime figures. The Heller's Cafe investigation, which included a number of court-authorized wiretaps and interceptions, verified the truth of the allegations. Such information as was obtained during the Heller's Cafe investigation which related to the Strike Force investigation was provided, in due course, to the Strike Force. To the best of my recollection, both Messrs. Lewis and Goldings also were aware of the Strike Force investigation.

6. During the pre-grand jury interview with Mr. Lewis, he was asked whether he was paying "rent." Mr. Goldings advised, to the best of my recollection, that Mr. Lewis would refuse to answer any questions, informally or before the grand jury, regarding "rent" because of Mr. Lewis' fear for the safety

of his family. In addition, I was told that Mr. Lewis would not answer questions regarding the identity of the person running the bookmaking organization he was working for at the time of the interview. I was assured by Mr. Lewis and Mr. Goldings that Michael London was not implicated in Mr. Lewis' "rent" situation and that his current employer also was unrelated to Mr. London and Heller's Cafe. There existed no independent evidence linking Mr. London to Mr. Lewis regarding "rent." There was such evidence, however, with regard to certain other bookmakers and that evidence was provided to the Strike Force. During the time period relevant to the Heller's Cafe investigation, Mr. Lewis was self-employed as a bookmaker. I stated that I would not ask Mr. Lewis any questions regarding "rent" before the Heller's Cafe grand jury nor would I inquire into his current arrangements beyond identifying himself as a bookmaker. I determined that the circumstances of Mr. Lewis' "rent" and his current employment situation appeared to be beyond the scope of the Heller's Cafe investigation. The assurance provided by Messrs. Goldings and Lewis combined with lack of evidence connecting Mr. Lewis to Mr. London regarding "rent" convinced me not to make an issue of his refusal to testify.

7. Consistent with my stated intentions, I did not ask Mr. Lewis any questions regarding "rent" or who was running the bookmaking operation within which he was working at the time of his testimony before the Heller's Cafe grand jury. Mr. Lewis, however, was asked by a member of the grand jury for the identity of the person for whom currently he was working. Mr. Lewis refused to answer. I did not seek an order to show cause regarding contempt. Mr. Goldings did not raise the matter with me. I do not today recall whether Mr. Lewis left the grand jury room to confer with Mr. Goldings prior to refusing to answer the grand juror's question.

8. I did not promise or state that Mr. Lewis never would be asked questions about "rent" or about the identity of his

employer. I was not asked by Mr. Goldings to provide such assurances. I would not, under any circumstances, commit to protecting Mr. Lewis, in perpetuity, from ever being asked before any grand jury or in any court proceeding, to whom he paid "rent" or for whom he worked. I decided that these issues were not part of the Heller's Cafe investigation that I supervised.

9. The decision not to ask Mr. Lewis about these matters before the Heller's Cafe grand jury was not a *quid pro quo* to receive his testimony. Mr. Lewis was ordered to testify; I was not required to and did not promise him anything to receive his testimony regarding Heller's Cafe, Michael London, and the checks that Mr. Lewis negotiated through Heller's Cafe. The communication of my decision to Mr. Lewis that I was not going to ask about "rent" or current employment, beyond the field of employment, in the Heller's Cafe grand jury and create a potential contempt problems may have made Mr. Lewis more comfortable in testifying before the grand jury; it was not, however, part of any deal to obtain his testimony regarding Heller's Cafe and it surely was not a promise that the issue never would reappear.

I declare the foregoing to be true, upon knowledge, information and belief.

MITCHELL D. DEMBIN
Assistant U.S. Attorney
San Diego, California

APPENDIX M.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: GRAND JURY
PROCEEDING
(EDWARD LEWIS) M.B.D. No.

AFFIDAVIT

I, Mark W. Pearlstein, being duly sworn, hereby depose and state as follows:

1. I am an Assistant United States Attorney working in the Economic Crimes Unit of the Office of the United States Attorney located in Boston. I have been an Assistant United States Attorney since 1989. I am a member in good standing of the bars of the Massachusetts Supreme Judicial Court, the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit.

2. During 1990 and 1991, I was involved in an investigation of a Boston area check cashing business suspected of money laundering on behalf of bookmakers. In substance, the government suspected that certain bookmakers were being given checks by gamblers as repayment for sports gambling debts. To conceal the fact that the bookmakers were the recipients of these funds, the checks would be made payable to fictitious third parties (*e.g.*, John Smith rather than Edward Lewis). Although the bookmakers would be unable to negotiate these checks at most financial institutions, the check cashing business which we were investigating would cash three checks for fees ranging between 1-2 percent.

3. Edward Lewis cashed a large number of checks at the check cashing business then being investigation. Statutory

immunity was obtained to permit him to testify without incriminating himself.

4. It is true that I did not question Mr. Lewis regarding the issue of "rent payments." However, my reason for not doing so was that the subject of "rent payments" had little relevance to the issue we were then investigating; *i.e.*, the conduct of the owner of the check cashing busines.

5. I was aware that former Assistant United States Attorney Dembin had also refrained from asking Edward Lewis questions about "rent." I had become aware of this fact by reading the transcript of Lewis' testimony before an earlier grand jury.

6. My decision not to question Mr. Lewis regarding the subject of "rent payments" reflected nothing more than my judgment that the subject was of little direct relevance to the investigation we were then conducting. I specifically deny any suggestion that this forbearance had anything to do with a bargained for cooperation agreement.

No such agreement existed; Lewis refused to testify in the absence of statutory immunity. Once the immunity was obtained, he was obligated to testify.

Subscribed to under the pains and penalties of perjury, this 23rd day of April, 1993.

Mark W. Pearlstein
Assistant United States Attorney

APPENDIX N.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In Re: Grand Jury Matter : MC 91-10007

Before: Hon. Mark L. Wolf
United States District Judge
Boston, Massachusetts

Courtroom No. 4
Post Office and Courthouse
Boston, Massachusetts
April 28, 1993

[3] THE CLERK: All rise for the Honorable Court.

You may be seated. This is Matter 91-10007 in re: Grand Jury Matter. Court is in session.

THE COURT: Would counsel please identify themselves for the Court and the record.

MR. WYSHAK: Fred Wyshak and Brian Kelly for the United States.

MR. GOLDINGS: Morris Goldings and Alice Moore for the wintess Edward Lewis.

THE COURT: And, Mr. Lewis is also present as well as Mr. Pearlstein who submitted an affidavit.

I would like to make sure we have a clear and common sense of why we are here. On about April 8, the Government filed a petition for civil contempt for the refusal of Mr. Lewis to answer questions about whether he made certain payments to receive protection or otherwise relating to the business as a bookmaker.

When he was asked those questions after having been compelled under 18 United States Code, Section 6001, I had a hearing that morning and gave the parties an opportunity to brief the issues. I have received submissions from the Government which include affidavits from Mr. Pearlstein, an Assistant United States Attorney Mitchell Dembin and former United States Attorney in Boston who now is an Assistant United States Attorney in California.

[4] In addition, since when I saw you last time, there was a question of the efficacy of the original compulsion and immunity order because there was a different Grand Jury. You suggested that that might be moot if the Government applied for a new order annd they have given me an application for a new order.

Mr. Goldings, do you agree -- and I encourage you all to talk -- I saw you didn't address this issue in the papers, so I wouldn't have inferred that you agreed that if I entered the new

order the question of whether there is an effective order in place would be moot and we could proceed as if it were under the new order.

MR. GOLDINGS: Yes, it was represented to me that it would be furnished to you. We don't see copies of it, and we did review in our papers the issue that we believe that if we have an agreement that it follows and continues through the new order.

THE COURT: Yes.

MR. GOLDINGS: But from a formalistic point of view, the order is in proper form and at some point I would like to see it or I would like to suggest to your Honor not to even issue it until you have decided the underlying issues as to whether there is an agreement. As far as that issue is concerned, a new order would moot that first question. It would not moot the perjury issue and that was something while **[5]** having discussions with my brother about it, there have been no papers filed about it. And, that is the issue of whether or not he still has a privilege against self-incrimination on the issue of perjury and whether he has had an opportunity to recant and that is not addressed in the order.

THE COURT: It is not addressed in the order. It is also not a matter addressed in the papers. I didn't look for the Second Circuit case. But, as a practical matter, he is subject to an effective immunity order if they ask him questions before the Grand Jury they will have to meet the requirements of Kastigar and in the North case. They are pretty high.

I am going to take up all of your purported arguments. It is alleged -- for not answering today. And, I am going to decide it. But, as a practical matter, I think somebody down the line would have to decide whether he testifies pursuant to this order -- whether they created a sufficient Chinese wall to avoid that.

But, with regard to this order which I think I will enter, there is no question that there is now a valid compulsion and immunity order and the issue of whether there is some agreement that restricts the range of questioning is the one as far as I am concerned to be decided.

Now, in order to establish contempt, the Government has to prove civil contempt by clear and convincing evidence. **[6]** But, when we are under the so-called recalcitrant witness statute, U. S. Code 28, the burden is on the witness, Mr. Lewis, that he is excused from testifying for just cause.

One of the decisions that I rely on is In re Liberator, 574 F 2d 78, a Second Circuit case.

Essentially, as I understand it from the memoranda filed, the claim here is that there is an enforceable agreement originating with Mr. Dembin and honored by Mr. Pearlstein that although compelled to testify, Mr. Lewis would not be asked about so-called rent payments. And Mr. Dembin and Mr. Pearlstein filed affidavits denying that such promises were made.

And, the Government takes the position that I shouldn't take any testimony today because there is no affidavit from Mr. Lewis or from Mr. Goldings.

What is Mr. Lewis' position on how we ought to proceed today?

MR. GOLDINGS: Mr. Lewis filed a proffer of evidence and Mr. Lewis is prepared to testify as to his understanding of matters that were discussed in his presence. Mr. Pearlstein is here. I didn't go to the effort of getting Mr. Dembin here because I think the issue of factual dispute is relatively narrow. I didn't read the Dembin affidavit or Pearlstein's affidavit to deny that there was first of all a discussion on limitation of the question and in an agreement **[7]** that at least as to the matters that each of those respective United States Attorneys were dealing with, they wouldn't go into that subject matter.

[7] The disagreement is, as was said in the papers filed by Mr. Wyshak whether that was an agreement that that would be in perpetuity. I think that was used by the Government. We don't contend that it was in perpetuity. I think I represent what the testimony is going to be and it is inevitably oral evidence that it would -- there was no term of limit as to how long this understanding would exist and, therefore, and under contract law I think a reasonable term must be implied if we are talking garden variety contracts.

And, my suggestion and my argument is that a reasonable term is the term during which the United States has under investigation there the Grand Jury or through Grand Juries the general subject matter as to which he was indeed the subject of questioning. And, that would include I suggest the very proceedings that they are trying to get him to testify to today because there is I think a logical and continuous investigation.

The Government makes the suggestion, as I read their papers, that there is some distinction between one instance of investigation and his interest in the subject matter and another instance, or for that matter, the so-called Strike Forces' interest in another subject matter.

[8] I suggest to your Honor that there is one United States, there is one Justice Department. And, that if the agreement, as I say it was or understand it, by two assistants or one assistant and faithfully followed by the second assistant, and if it means anything it means that it should have contacted everybody who was then investigated within the Government, in effect, are we going too far in reaching this understanding.

My analogy when immunity grants are required in these cases, and I believe in the federal system, a check is made with other prosecutors just to be sure that an unfortunate result to the Government would be obtained by reaching some kind of result, either a grant of immunity or in this case cutting away at a certain subject matter.

And, I think that is the issue of contention. I did not contend that it was in perpetuity.

THE COURT: As a practical matter, you don't perceive a need to have Mr. Dembin here?

MR. GOLDINGS: That is correct. I do not think the evidence would raise the question of whether there was an actual limit of time. Am I sure of that? No.

The second area of evidence, I don't think should be contested. It is just --

THE COURT: Let me ask you this: If we have a hearing, which I am inclined to have, Mr. Lewis -- I can **[9]** control the order of the witnesses -- Mr. Lewis would be the first witness.

MR. GOLDINGS: Yes.

THE COURT: I asked Mr. Pearlstein to be available. I didn't know how it would go. So, he might be the second witness. Would there be any other witnesses?

MR. GOLDINGS: If I am surprised by the evidence, I would like to be a witness, but it would be -- well, I would make my offer of proof, it would be that no term of year's time was made, that is all.

THE COURT: Well, that is a possibility. So, we may have up to three witnesses?

MR. GOLDINGS: Yes.

THE COURT: Okay.

MR. GOLDINGS: The other subject matter, and it would be the same number of witnesses. It is factual, and I don't think it should be disposed of, that over and above the appearances before the Grand Jury and at the London trial, Mr. Lewis subjected himself to hours, literally many hours of interviews at various United States Attorney offices which I was present in most of them which went quite beyond his obligation under the immunity order.. He provided an enormous amount of information both general and specific about the investigations.

This I suggest is consideration for the agreement in response to the Government's argument that there **[10]** was no consideration because he was under the compulsion order. That is the other factual issue.

THE COURT: Well, I think it is most appropriate to take the testimony because -- well, I don't think the First Circuit has ever taken this position. The Ninth Circuit has taken the position that a civil contempt proceeding is a trial. It may be done by affidavit, and it is generally -- and the Ninth Circuit case I had in mind was Hoffman vs. Beer Drivers 536 F 2d 1268 and 1277.

Mr. Lewis will be the first witness. He will testify under oath subject of course to the pains and penalties of perjury.

Mr. Lewis, would you approach the witness stand and be sworn?

Maybe we better ask Mr. Pearlstein to step out at this point, but hopefully it won't be too long.

MR. WYSHAK: If I might, if Mr. Goldings intends or believes he might or ought to be a witness, I don't believe it is appropriate to participate. And I note that he has brought co-counsel to assist him. And, he like any other witness should not be in the courtroom and should be excluded during the taking of the testimony.

THE COURT: It makes some sense.

MR. GOLDINGS: That is a rule that comes from the days or from the circumstances of the jury trial and the provision is that a witness, that a lawyer should not be a witness and examine himself or argue from his own testimony. It is not that he is disabled from participatiing in the rest of the trial. I think that is the rule that he is referring to.

THE COURT: Well, as a practical matter, I think you are right, a lawyer is not supposed to be giving -- for his own credibility. But, I think if you read the Supreme Judicial Court's rule, it is not limited to those circumstances. Although there

are some exceptions for hardship. We have got co-counsel here, why shouldn't she question Mr. Lewis.

I mean, if I do that, I am going to excuse you from the courtroom as well.

MR. GOLDINGS: I should make a decision as to whether I should put myself on.

THE COURT: Yes.

MR. GOLDINGS: Can I have a moment?

THE COURT: Yes. Ms. Lovett will administer the oath to Mr. Lewis.

EDWARD LEWIS, SWORN

DIRECT EXAMINATION BY MR. GOLDINGS

MR. GOLDINGS: I will proceed on the understanding that I will not be a witness.

[12] THE COURT: And, you feel comfortable in the circumstances, Mr. Goldings, that your client won't be prejudiced by taking you out of that potential role?

MR. GOLDINGS: I think it would have been corroborative and I have made a tactical decision and I am satisfied.

THE COURT: You may proceed.

Q. Mr. Lewis, state your name, please, sir?

A. Edward Lewis.

Q. I think you better get a little back from the mike. Where are you presently residing?

A. North Miami Beach, Florida.

Q. Mr. Lewis, calling your attention to the year 1987, did you receive a subpoena to testify before a Federal Grand Jury?

THE COURT: Actually, before you go on, I want to clarify this. I want to clarify something. This is a civil contempt proceeding to determine whether the existing compulsion order requires Mr. Lewis to answer questions about these rent payments.

Essentially, as I understand it at the moment, Mr. Lewis is testifying here pursuant to those orders. But, if he commits

perjury in his testimony here today, he can be prosecuted for that. Is that your understanding?

MR. GOLDINGS: That would be my understanding.

[13] THE COURT: Is that consistent with the Government's understanding?

MR. WYSHAK: Yes.

THE COURT: Do you understand that, Mr. Lewis? You have taken an oath to answer the questions that you are asked by both sides and perhaps by me truthfully, and the failure to do that could constitute a prosecutable criminal offense?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

Q. (By Mr. Goldings) Calling your attention to in or about July of 1987, do you recall receiving a witness subpoena to testify before a Federal Grand Jury?

A. Yes.

Q. As a result of receiving that subpoena, what did you do?

A. I came to -- I answered it.

Q. And, among the things that you did to answer it, did you accompany your lawyer and pay a visit to the office of the United States Attorney?

A. Yes, I did.

Q. And, do you recall who was present, first of all, when that visit occurred?

A. The exact date I don't remember. But I do remember sitting down with you, Mr. Dembin, and I believe Mr. O'Sullivan.

[14] Q. Do you recall whether any other people were present?

A. Those are the only ones I remember.

Q. Now, on that occasion do you recall any discussion concerning whether or not you would be asked and answer questions concerning two subjects: First, who you presently bet with. And, secondly, whether or not you paid rent or so-called protection money to anybody?

A. I feel that an agreement was made that I wouldn't have to answer those questions if I was willing to answer all the questions regarding gambling, how to set up bookmaking, how to get lines. I was asked dozens and dozens of questions along those lines.

Q. At this interview did you --

THE COURT: I don't think he answered your question. You asked him whether the subjects were discussed.

Q. (By Mr. Goldings) Were the subjects of your -- two subjects, who you then bet with, was that discussed?

A. To the best of my memory, I believe the questions were asked and I said I wouldn't answer the questions but I would answer anything else with regards to gambling.

Q. Now, those questions, the first area I asked you was who you bet with, was there a subject of whether you paid rent to anybody, was that a subject that was discussed as to whether you will be answering questions?

A. They said I wouldn't have to answer those questions.

[15] THE COURT: Well, I want to go back and I want -- what year was this, 1987?

MR. GOLDINGS: '87. Either '87 or early '88.

THE COURT: We are talking about five or six years ago?

MR. GOLDINGS: Yes.

THE COURT: Mr. Lewis, do you understand you are required to testify based on what you actually remember as you sit here today. And, if you don't have a specific memory on some point, your testimony should be: You don't remember. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: I don't want you to speculate or or guess as to what might have been said, although you are not required to remember the exact words if you remember the substance of the specific conversation.

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

Q. (By Mr. Goldings) First was the subject -- let's address ourselves to the issue of paying rent because that is the only presiding issue. Was the subject in that discussion with Mr. Dembin and sometimes with Mr. O'Sullivan, was the subject of whether or not you would be asked questions concerning the payment of rent brought up?

A. Yes.

[16]Q. Do you recall the specific conversation what each person said on that occasion?

A. The specific conversation, what each person said, I don't remember.

Q. What --

A. I don't remember what I said.

Q. What do you recall what you said?

A. If you are going to ask me questions regarding those things, you might as well put me in jail now. If you want to ask me about gambling questions, I will answer all the questions you want to ask.

Q. When you say "those things," what are you referring to?

A. Rent, that is No. 1.

Q. Do you recall a specific response made by either of the two gentlemen from the United States, do you recall what the essence or the gist of it was?

A. The essence or the gist of what was said is that they would not ask me any questions regarding to rent or the Arm as long as I answer all the questions regarding the gambling.

Q. Now, was there any discussion by anybody as to when, for what period of time, if any, this not asking you questions were to occur?

A. It was never brought up, but I assume it was forever.

Q. What was said, do you recall anything being said?

A. No, I do not remember the exact words that were said.

[17] Q. Now, in fact, at that interview, how long did that interview take place?
A. How long did it take place, how long a time?
Q. Yes.
A. A long time.
Q. Well, was it more than an hour?
A. I would say, yes, more than an hour.
Q. Was it more than two hours?
A. I would say in that vicinity?
Q. About two hours. And, is it fair to say that you did answer a variety of questions about gambling procedures?
A. Dozens and dozens of questions.
Q. And, about specific instances of gambling other than relating to yourself?
A. Yes.
Q. Were you, in fact, asked any questions about rent during that interview?
A. No.
Q. Now, subsequent to that interview, do you recall that you did testify before a Grand Jury at some time?
A. Yes.
Q. How soon after that interview do you recall that you testified before the Grand Jury?
A. It wasn't too long after the interview.
Q. Now, did there come any time subsequent to your Grand [18] Jury testimony, from your first Grand Jury testimony, that you were again interviewed by any representative of the United States Government on this subject?
A. Yes.
Q. By whom was the second interview?
A. I believe it was a gentlemen, Mark Pearlstein.
Q. Now, how long after the first interview was the second interview?
A. I guess about a year.

Q. All right. Now, where did that second interview occur?
A. Same place; same order.
Q. U. S. Attorney's office?
A. Yes.
Q. Who was present besides Mr. Pearlstein and yourself?
A. I don't remember, you were.
Q. Besides the three of us who were present?
A. I don't remember.
Q. Now, in that interview did the subject of whether or not you would be asked questions about the payment of rent come up?
A. It never came up.
Q. It didn't come up?
A. Not to my memory.
Q. Not to your recollection.
A. No.
[19] Q. Were you, in fact, in that interview asked any questions about the payment of rent?
A. No.
Q. Now, subsequent to that interview, do you recall a further interview with the United States between that time and the time you were interviewed on several occasions in preparation for the London trial, was there any interview in between?
A. I don't remember.
Q. All right. Do you recall whether or not you were interviewed in preparation for the London trial?
A. I believe I was.
Q. On how many occasions?
A. It seems they keep coming back and forth, I don't remember.
Q. Who interviewed you in that interview?
A. I believe it was someone over here.
Q. You mean Mr. Wyshak?
A. Yes, Mr. Wyshak.

Q. Were there any other interviewers there?
A. Yes.
Q. Who was that?
A. Mr. Kelly?
Q. Was it Mr. Kendall?
A. Yes, Kendall.
[20] Q. You said Kelly, was there a Mr. Kelly?
A. No, Mike Kendall.
Q. All right. During those interviews with Mr. Kendall and perhaps Mr. Wyshak, do you recall any discussion on the subject of whether or not you would be asked --
A. Mr. Kendall, no.
Q. Nor with Mr. Kendall.
A. No.
Q. With Mr. Wyshakj?
A. I don't remember.
Q. All right. In fact, during those interviews prior --
A. It was never asked during the interviews. I was asked once during a Grand Jury.
Q. Yes, we know that. I am just getting during the interviews.
A. All right. No.
Q. During the interviews were you asked it?
A. No, no.
Q. Now, during those interviews with Mr. Pearlstein and Mr. Kendall, were you asked a volume of questions about betting practices and procedures?
A. Dozens and dozens of questions.
Q. How many hours would you estimate you spent, for example, with Mr. Kendall prior to the London trial on the subject of gambling practices and procedures in addition to **[21]** whatever your testimony --
A. At least five to eight hours. At least.
Q. And, that was on general practice of gambling, not simply preparation of your specific testimony in the London trial?

A. That's right.

Q. Just to review the one issue of whether or not you recall any conversations coming from the Government as to any length of time or term during which your understanding that you wouldn't be asked any questions about payment of rent would cover, any period of years or any period of time?

A. No, it was never mentioned.

Q. All right. Now, Mr. Lewis, if the Government had persisted in asking you questions or had asked you questions about payment of rent at those interviews, what would you have done?

A. I would have been held for contempt.

Q. What would you have done?

A. I wouldn't have answered it.

MR. GOLDINGS: I have no further questions.

THE COURT: You may inquire.

MR. WYSHAK: Thank you.

CROSS-EXAMINATION BY MR. WYSHAK

Q. Mr. Lewis, when you were originally subpoenaed in 1987 [22] by Mr. Dembin, did you appear before a Grand Jury initially after your received a subpoena?

A. Initially I had an interview with them.

Q. Did you go into the Grand Jury and at some point refuse to testify?

A. No.

Q. You were served with a copy of an immunity order compelling you to testify, that right, back in 1987?

A. Yes.

Q. Okay. Did your interview with Mr. Dembin occur before or after you were served with that immunity order, do you recall?

A. To the best of my recollection, I had an interview with him first.

Q. Were you represented by Mr. Goldings at that time?
A. Yes.
Q. Is it your recollection that Mr. Goldings permitted you to talk with the Government attorneys before he had received immunity for you?
A. I don't remember, actually, I really do not know.
Q. Okay.
A. It was a long time ago.
Q. Do you recall if you discussed with Mr. Goldings at that time in 1987 that you would receive immunity in return for your testimony?
[23] MR. GOLDINGS: Objection.

THE COURT: Because that would be a privileged communication unless the witness wishes to waive the attorney-client privilege or unless you establish that there was some third party so that the confidentiality was breached, that is a valid objection.

MR. WYSHAK: Well, Judge, I think where the witness is putting in issue his understanding of an agreement made between himself and the United States in which his attorney participated, it goes to his understanding of certain representations made to him by counsel.

THE COURT: Well, I think there is another way to get at this if you have the documents. First, you know the date of the immunity order, January 3, 1991, right? Do you know the date of the interview?

MR. WYSHAK: No, this would have been in 1987, Judge.

MR. GOLDINGS: December 15th, 1987, it is a Woodlock order we are referring to.

MR. WYSHAK: All right, I will proceed by way of the documents.

Q. (By Mr. Wyshak) Mr. Lewis, I am going to show you a copy of an order --

MR. WYSHAK: And, Judge, just for reference, this is Exhibit C from the witness' files, a copy of an order dated [24] December 15, 1987, signed by Judge Woodlock.

Q. And, this is an order granting you statutory immunity.

A. Yes.

Q. Now, I am showing you what is marked as Exhibit B and appended to the papers filed on your behalf, do you see a letter dated December 29th?

A. Yes.

Q. To Mr. Goldings?

A. Yes.

Q. Basically representing that --

MR. GOLDINGS: I think if you are going to offer it, it speaks for itself.

THE COURT: He can say what it says.

Q. Basically the letter says that Mr. Dembin is in possession of an immunity order and he requested that you appear before the Grand Jury and requested that you have an opportunity to be interviewed, is that correct?

A. I would say yes.

Q. So, refreshing your recollection of those documents, did it appear that you did not speak with Mr. Dembin until after he had obtained an immunity order?

A. Yes, I would say you are right.

Q. So, when you were initially served with a subpoena, you refused to testify, is that fair to say, either through your attorney Mr. Goldings or by appearing before the Grand Jury [25] asserting your Fifth Amendment privilege?

A. I think that is correct. I am going to give you the best way I can tell it. I got a subpoena. Mr. Goldings said: You have got to go up and see Attorney Dembin. I went to see him. He might have said you have immunity. I said: What does it mean in essence? He said: You have to answer all the questions that I asked you.

THE COURT: Who said that?

THE WITNESS: Mr. Dembin. He said: You have to answer all the questions that were asked. I said: If you are going to ask me questions about rent or Arm, I am not going to answer them, so don't waste any more time.

I said: If you want to ask me questions about gambling, I will tell you everything you want to know about gambling.

He said: That's all we want to know from you.

I said: Okay. And, I sat there and I answered dozens of questions.

Q. I understand that. When you first were subpoenaed, where were you first residing at that time?

A. I believe I was in Florida.

Q. You were residing down in Florida?

A. Yes.

Q. So, an agent came and served you with a subpoena in the State of Florida?

[26] A. Yes.

Q. Did you contact Mr. Goldings at that time?

A. I assume I did; that is the first thing I would do.

Q. And, Mr. Goldings handled the matter for you, is that fair to say?

A. I would have to say yes.

Q. The next time you heard from Mr. Goldings was when he told you you would have to come up to be interviewed?

A. Yes.

Q. And, at that point in time, you were made aware that the United States had obtained an immunity order compelling you to testify?

A. Yes, he told me that.

Q. Okay. Now, Mr. Dembin also told you that because he had obtained an immunity order, you had to answer all questions that he asked of you?

A. Yes.

Q. Is that fair to say?
A. Yes.
Q. If you refused to answer, you understood you could go to jail?
Q. Is that fair to say?
A. Yes.
Q. I assume Mr. Goldings also explained that to you?
[27] MR. GOLDINGS: Objection again to what Mr. Goldings said.
THE COURT: Sustained.
Q. Was Mr. Goldings present when Mr. Dembin told you that?
A. Yes.
Q. Prior to your arrival at Mr. Dembin's office, did you understand that you now had to answer all questions or you would go to jail?
A. I think yes.
Q. So, you understood that going in?
A. Yes.
Q. Now, you testified that you were interviewed by Mr. Dembin and Mr. O'Sullivan at the same time?
A. They were present.
Q. During the course of the interview you indicated that you would not answer questions regarding rent?
A. Yes.
Q. But you would answer questions regarding anything else concerning your gambling activities, is that fair to say?
A. Yes.
MR. WYSHAK: May I have a moment, Judge?
THE COURT: Yes.
Q. Do you also recall that at that time you didn't want to disclose your current gambling activities at that time in 1987?
[28] A. I don't remember that at all.

Q. You don't remember that you wanted to testify about what you had done regarding Michael London and your previous gambling activities, but you didn't want --
A. I don't think Michael London was brought up at that time.
Q. Wasn't that part of the subject matter that you were asked about some checks that were cashed at Michael London's?
A. It is very possible.
Q. Okay. You were shown checks in the Grand Jury and asked --
A. At that time?
Q. Yes, 1987.
A. Okay.
Q. We are backing up a little bit.

MR. GOLDINGS: I think you said '87. I think you probably mean January of '88.

THE WITNESS: Yes.

Q. (By. Mr. Wyshak) Going back a little bit, the first meeting with Mr. O'Sullivan and Mr. Dembin, did you ever state in words or substance to Mr. O'Sullivan or Mr. Dembin that, look, either you have to agree not to ask me questions about rent or I am going to refuse to answer any question you ask of me. Did you ever say that in words or substance to them?
[29] A. I believe the way I stated that is the way I just did it before. If you are going to ask me questions about rent or Arm, I'm not going to answer them, you might as well put me in jail now. If you want to ask me anything about gambling, I would give you all the answers I know.
Q. So, basically what you said to them is: Look, I will answer any questions you ask me about gambling, but I won't answer any questions about rent. Is that fair to say?
A. That is the gist of it.
Q. And, at the time you said that, you understood that despite how you felt they could insist on asking you questions about

rent and your refusal to testify they could put you in jail, you understood that?

A. Yes.

Q. But they made a choice, is that fair to say, and decided not to ask you the questions about rent but in fact to ask you the questions about gambling.

A. I think it was a verbal agreement.

Q. Well, do you recall --

MR. GOLDINGS: I move to strike his question that they made a choice, that is their question.

THE COURT: Well, I am going to proceed the way I tell the jury to proceed. It is the answers that are the evidence, not the questions.

Q. (By Mr. Wyshak) Tell us what you recall this verbal **[30]** agreement to have been?

A. I don't know; the same thing I just said.

Q. They won't ask you questions?

A. They won't ask me questions, that was what I had as an agreement.

THE COURT: Well -- but, what did they say. You said: If you are going to ask me questions about rent or Arm, you might as well put me in jail now. I will answer about gambling. Do you remember saying that?

THE WITNESS: Yes, I do, your Honor.

THE COURT: Do you recall Mr. Dembin or Mr. O'Sullivan saying anything in response to that?

THE WITNESS: From their own -- all they did was ask me questions about gambling, nothing on anything else. Hours on gambling.

THE COURT: Go ahead.

Q. (By Mr. Wyshak) So, you felt that you had an agreement with the Government, is that fair to say?

A. Yes.

Q. Did you ask for the Government to put this agreement in written form?
A. No, I didn't ask that.
[31] Q. Did you ask when you appeared and testified in front of the Grand Jury for the agreement to be made part of the record in the Grand Jury?
A. I did not ask that.
Q. Now, I am not asking you the substance of any conversation that you had with Mr. Goldings, but I am asking you for a yes-or-no answer. Did you discuss at all with Mr. Goldings whether or not any agreement that you felt that you had reached with the Government should be placed in written form?

MR. GOLDINGS: Objection.

MR. WYSHAK: I don't think I am asking for the substance. I am just asking whether or not there was a conversation.

THE COURT: Well, I think at this point I will sustain the objection, although there may be inferences that can be argued from the fact that a lawyer is involved and there is no writing memorializing the agreement. But, we will get to that later. I will sustain the objection.

Q. (By Mr. Wyshak) You do agree, however, that this agreement that you felt you arrived at was never memorialized in any fashion?
A. I don't know what memorialized means.
Q. Well, written down or made part of a court record?
A. It wasn't memorialized.
[32] Q. In fact, Mr. Lewis, isn't it fair to say that you understood that you were operating sort of at the good graces of the Government in this regard; that if the Government wanted to, they could insist on asking you questions about rent and they could put you in jail if you refused. Do you understand my question?
A. If you are saying if they go against their agreement any time they want to? If that is what you are telling me, yes.

Q. Mr. Lewis, you understood -- that's not my question -- you understood that the Government had the power because they had an immunity order signed by a judge to ask you questions about the rent, is that fair to say?

MR. GOLDINGS: Note my objection, it calls for a legal conclusion.

THE COURT: No, I think it goes to his understanding, and he has testified a good deal about his understanding. Overruled. Go ahead.

Q. (By Mr. Wyshak) Is that fair to say?

A. Do you want me to answer it?

Q. Yes.

A. I understand that the Government can do whatever they want to do. I understand that.

Q. Let's talk about this specific one item. You understood that the Government had the power because they had **[33]** an immunity order, or they had the authority to force you to answer questions about rent?

A. Yes, I understand.

Q. And, you understood that if you refused, they could put you in jail?

A. Yes, sir.

Q. So, you understood that by not pressing the issue at the time, the Government was basically refraining from exercising its power or its authority at that time?

MR. GOLDINGS: Objection. That calls for his understanding of something in the minds of the Government. He would have no way of knowing.

THE COURT: Well, I will sustain it as to form.

Q. (By Mr. Wyshak) Let's move on a little bit. Mr. Lewis, there came a time when you did testify in the Grand Jury in 1988, is that correct?

A. Yes. Is that the first one?

Q. Yes.

A. Mr. Dembin?
Q. That's correct.
A. Yes.
Q. Directing your attention to page 36 of the Grand Jury minutes --

MR. GOLDINGS: Would you give me a copy of those; I don't have them

[34] MR. WYSHAK: I only have one copy at this moment.

MR. GOLDINGS: May I look on?

THE COURT: Go ahead.

Q. (By Mr. Wyshak) Do you see that?
A. Yes.
Q. At the end of your testimony you were asked a series of questions by a Grand Jury?
A. Do you want me to read this?
Q. Read it to yourself.
A. Starting where, over here?
Q. Yes.
A. Where do you want me to read now?
Q. Read that page, please.

Do you recall earlier when I asked you if when you had reached an understanding with Mr. O'Sullivan and Mr. Dembin that you wouldn't have to testify about who you were working for at the current time?

A. No, I thought you asked me who I paid rent to. What was that question you asked me?

THE COURT: Well, I think that -- I will check my notes -- but I think that may not have been pinned down.

Q. (By Mr. Wyshak) Well, in any event, does that refresh your recollection as to at the end of your Grand Jury testimony you were asked questions by the Grand Jury and also by Mr. Dembin about your current gambling activities at that **[35]** time, January of '88?

MR. GOLDINGS: Objection. I think the document should be made part of the record. It speaks for itself as to the chronology of the Grand Jury.

THE COURT: He can answer that.

THE WITNESS: I will answer it. They asked me a question which I had difficulty in answering. I said may I speak to my attorney. I asked to speak to my attorney. And, I went out to see my attorney and I said, they asked me who am I turning my business in to. And, I told him I don't want to answer it.

He said: Well, go back and say you don't want to answer it.

So I said: I don't want to answer it.

They said: Forget about it.

Q. So, you do recall that?

A. Yes.

Q. So, there was another question that you refused to answer in front of the Grand Jury?

A. Yes.

Q. And, at that time in 1988 you were working for Chico Krantz, is that true?

A. Yes, that is true.

Q. Now, did Mr. Dembin seek a petition for contempt because you didn't answer that question?

[36] A. I don't understand that question.

Q. Did Mr. Dembin try to put you in jail because you didn't answer the question?

A. No.

Q. When you were being interviewed by Mr. O'Sullivan and Mr. Dembin, did they ask you about your current gambling activities or bookmaking activities?

A. No, they never asked me.

Q. Now, then, there came a time that you were called by Mr. Pearlstein to testify before his Grand Jury?

A. The next one, yes.

Q. Did you have a conversation with him about rent?

A. No, he never asked me anything about it. To the best of my recollection, he didn't ask me about it.
Q. Were you present in a conversation with Mr. Pearlstein or and Mr. Goldings where that matter was discussed?
A. I do not remember any mention about that, again.
Q. You don't?
A. No, I do not.
Q. Okay. So, you went in and you testified in Mr. Pearlstein's Grand Jury and nobody said anything about rent?
A. No, all they asked was gambling questions.

THE COURT: I think that that was a different question. At first he was asking about a meeting. Now you are asking him whether anybody in the Grand Jury asked him **[37]** about rent. When Mr. Pearlstein had you in the Grand Jury, did he ask you about rent?

THE WITNESS: No, when I was in front of the Grand Jury he never asked me a question about rent.

THE COURT: Go ahead.

Q. (By Mr. Wyshak) Then there came a time when you received a Grand Jury subpoena --

THE COURT: Actually, can we fix this in time, when did Mr. Pearlstein have Mr. Lewis in the Grand Jury?

MR. WYSHAK: It was January 8, 1991, Judge.

THE COURT: January 8, 1991.

Q. Then there came a time when you received a subpoena from myself and Mr. Kelly?
A. Yes.
Q. Is that correct?
A. That is correct.
Q. Do you recall being present in a meeting with Mr. Goldings, Mr. Kelly and myself where we indicated to you, Mr. Kelly and I, that we intended to question you about rent and that we intended to question you about who you were workiing for?

MR. GOLDINGS: Well, I think --

THE WITNESS: No, I don't remember that at all.

MR. GOLDINGS: I suggest that the same rules apply since my brother isn't going to be a witness.

[38] THE COURT: He can ask the question, but he he is not going to be an answering witness.

Q. You don't recall that at all?

A. Not in an interview. The first time I heard that mentioned was before the Grand Jury, and you shocked me by asking me did I pay rent. I said no. I was shocked.

Q. I am going to show you the Grand Jury minutes for February 13, 1992.

A. The Grand Jury, yes.

Q. Yes. In the Grand Jury, bottom of page 60, there is a question, and I will read it to you.

A. I can't see it; tell me where it is.

Q. It is at the bottom of the page here.

THE COURT: Page 60?

MR. WYSHAK: Yes.

THE COURT: Or 59?

MR. WYSHAK: The question that I am specifically referring to is the bottom of page 60, Judge, where it says: Mr. Lewis, didn't you advise me earlier that when you were a bookmaker for Krantz, Chico Krantz, you suspected him of paying rent?

Yes.

To the local Mafia, is that right?

As far as I am concerned --

THE WITNESS: I don't recall, but I am sure I said **[39]** it.

Q. Now, having refreshed your recollection with that question and answer, do you now recall that there was an interview prior to your Grand Jury appearance --

A. Yes.

Q. -- where Mr. Kelly and I discussed in the presence of Mr. Goldings and with you the issue of rent?
A. No, I don't. I don't.
Q. Can you explain that if you recall at all what Mr. Kelly's reference to the earlier conversations means?
A. They were talking about Krantz. I can't understand it.
Q. Referring you to the bottom of page 60: Did you advise me earlier -- do you recall an earlier conversation of the mentioning on the sixth floor of this building the Strike Force?
A. There were so many meetings, but I don't remember you mentioning that before I went to the Grand Jury. You shocked me when you told me at the Grand Jury. That is the only thing I remember in my mind. I don't know if it was the first question you asked. I don't even remember.
Q. Do you recall aside from the issue of rent that at that earlier conference you were concerned that it was the intention of Mr. Kelly and I to ask you about who you were working for at the current time and you felt that you had an agreement that you didn't have to testify about that based on **[40]** your previous Grand Jury appearances? Do you recall that being an issue, you did not want to tell us about Chico Krantz?
A. I didn't want to tell you, but I never made it an issue. I never made it an issue. I didn't think it was necessary. When you told me it was necessary, I told you I worked for Krantz.
Q. And, you don't recall saying in words or substance of your agreement when you testified before you wouldn't have to testify about who you were working for?
A. No, I don't recall that at all.
Q. And, you don't recall us asking questions about rent, either?
A. At the Grand Jury I remember, yes.
Q. At that earlier meeting --
A. No, I do not recall it.

Q. Yet when Mr. Kelly asked you this question: Mr. Lewis, didn't you advise me earlier that when you were a bookmaker for Krantz, you suspected him of paying rent -- you didn't appear shocked or surprised at that time. You responded to the questions?

A. That's right. I don't remember the words that were put to me. You people are good at words. I am not that good at it.

Q. Do you recall we mentioned the issue of rent at the earlier meeting before the Grand Jury?

A. No, I don't remember.

MR. GOLDINGS: There is a question of the issue of rent and who he paid rent to and who Krantz pays rent to.

MR. WYSHAK: I am just trying to refresh his recollection as to his credibility.

THE COURT: The question is overruled. I think the witness understood the question.

Q. Referring you to page 59.

A. Where, here?

Q. Page 59, see that line 18: Did you ever and -- do you know what the term rent means? Do you see that questions?

A. Yes.

Q. What is your answer to that question as it has been taken down by the Grand Jury stenographer? Please read it, Mr. Lewis.

A. Over here?

Q. Yes.

A. Explain it to me, yes.

Q. Does that refresh your recollection that just a few hours prior to your Grand Jury appearance on that day we discussed the subject of rent payments as it affected you?

A. Mr. Wyshak, to the best of my recollection, no rent questions were ever asked to me until I went into that Grand Jury.

[42] Q. What does that answer mean: Explain it to me?

A. I don't know what it means. It doesn't even make sense to me. I don't know what it means. That is not even English. Explain it to me, I don't know what it means.
Q. In any event, at the time that that question was asked of you, did you say in words or substance that I have an agreement with the Government that I don't have to answer that question?
A. Did I say that?
Q. Yes.
A. No, not to my best recollection I didn't say that.
Q. And, you didn't say that because you understood based upon our earlier meeting that day that it was the Government's position that no such agreement ever existed, didn't you?
A. I didn't agree with you, Mr. Wyshak, you are trying to force me to say something that isn't true.
Q. At the time you were asked that question in the Grand Jury, did you ask to step outside to talk to Mr. Goldings?
A. No, I didn't.
Q. Isn't it fair to say that you were shocked and surprised and under the understanding that you had an agreement with the Government --
A. I was incorrect, I didn't have. I didn't handle myself properly. I shouldn't have said it; I shouldn't have said **[43]** anything.
Q. It is clear, though, when you previously testified in the Grand Jury when Mr. Dembin asked you questions, and you were asked a question that you didn't want to answer, you understood that you had the option of going outside the Grand Jury room and talking with your lawyer?
A. This was something I hadn't discussed before.

THE COURT: No, you have got to answer his questions.

THE WITNESS: Oh, I'm sorry.

THE COURT: The only question he asked you is: Did you understand that you could go out and talk to your lawyer before you answered that question?

THE WITNESS: Yes, I did understand that, yes.

Q. Well, when you were asked that question about rent in the Grand Jury in 1991 by me, you did not say: I would like to step outside and discuss this with my attorney. Did you?

A. No, I didn't, no.

Q. And, the reason why you didn't say that is because we had gone over this to some degree prior to your Grand Jury testimony that day?

A. Absolutely not.

THE COURT: Why don't you move on to something else. He has answered that a couple of times.

Q. (By Mr. Wyshak) Now, you told us that you cooperated [**44**] to some degree in terms of being prepared for the London trial, is that right, you met with Mike Kendall?

A. Yes, I did.

Q. And, you met with me I believe on at least one occasion where Mr. Kendall was present?

A. We might have met for one minute and you went right out.

Q. But, you do recall that?

A. Yes.

Q. Now, Mr. Kendall asked you a question about who did you pay rent to at the trial of Michael London. Didn't he ask you that question while you were sitting in the witness stand in this courtroom before?

A. No, I don't believe so. I think is was Mr. DiMento.

THE COURT: I would have to go back, but I think it is right.

MR. GOLDINGS: Yes, it is right.

Q. (By Mr. Wyshak) Well, when asked that question by Mr. DiMento at Mr. London's trial, did you raise the issue that you had reached an agreement with the Government that you wouldn't have to testify about that?

A. Did I raise an issue?

Q. Yes.

A. No, I refused to answer.

Q. Well, you didn't refuse to answer that question when Mr. DiMento asked it, did you?
A. Yes, to the best of my memory. I wouldn't give him the names.
Q. I understand you wouldn't give him the names. But when you were initially asked that question in this courtroom by Mr. DiMentio, you answered no, if my memory serves me correctly.

MR. GOLDINGS: I think that is a mischaracterization. I don't think you want to confuse the witness. This is a mischaracterization.

A. From my memory I believe I did tell him that I paid rent.
Q. When you came back and reappeared the second time?
A. I told him.
Q. But, when you were initially asked that question by Mr. DiMento in this courtroom, the first time you testified in the London trial --
A. Yes.
Q. -- did you deny that you paid rent to anybody?
A. I don't know.
Q. But, you do recall being asked that question?
A. I remember I was asked that question.
Q. Okay. And, at that time at the London trial you did not raise any issue that you had an agreement that you did not have to testify about that?
[46] A. No.

MR. GOLDINGS: I misstated, I wasn't there, but the memo of January 31 represents that he was asked that question and denied it. That started the process that your Honor is familiar with. I just withdraw my statement that he mischaracterized the evidence.

THE COURT: What memo was that in?

MR. GOLDINGS: It was a memo, your Honor, that is Exhibit H in our papers, our proffer, and a memo from -- to

Frank DiMento and Henry Katz and Michael Kendall which I just got a copy of which states that Edward Lewis testified before the Grand Jury and at trial that he did not pay rent. And, that started the process of what I called recantation. So, I wasn't there and I have never seen the transcript.

THE COURT: I was there. Go ahead.

Q. (By Mr. Wyshak) Now, you are aware that when people are called as witnesses at trial they do have some civic duty to cooperate with the Government, are you familiar with that concept?

A. Yes.

MR. GOLDINGS: I don't even know that that is true.

MR. WYSHAK: The question is what his understanding is. We all took civics in grammar school.

I am sorry, Judge, I will withdraw it.

Q. (By Mr. Wyshak) But, you do understand that as a **[47]** general principle people who are called as witnesses at a trial generally sit down and prepared for their testimony prior to their actual testimony in a courtroom, do you understand that that is the general principle?

A. I am not too familiar with law practices. I really don't know.

Q. You also understood that by granting you immunity in 1987 and continuing that grant of immunity throughout several Grand Jury proceedings and at a public trial, in effect you had received at least some kind of protection or assurance that you would not be prosecuted for your lifetime of gambling, is that fair to say?

A. Actually, I am a little confused with me because there were so many trials, Grand Jury trials, I had no idea who to ask, I didn't know anything about it. And, my attorney never told me about it, either.

Q. Well, Mr. Lewis, you do understand that you could have been prosecuted for your illegal activities as a bookmaker, is that correct?

A. Yes.
Q. And, you do understand that by, in effect, giving you immunity, the United States had made a decision not to prosecute you but rather to have you testify as a witness.

MR. GOLDINGS: Objection. That is a mischaracterization of use of immunity.

[48] MR. WYSHAK: I am asking what the witness' understanding is.

THE COURT: Well, why don't you do it in a nonleading manner?

Q. I will ask you, Mr. Lewis, regarding the possibility of your being prosecuted for your illegal gambling activities, what is your understanding?
A. The only understanding I had, Mr. Wyshak, when I sat before Michael Dembin was that if I answered all the questions in regards to gambling, I would have immunity and they would not ask me questions about rent. That is the understanding I had.
Q. But, you clearly understood if you answered all the questions, you were going to have immunity and, in effect, not be prosecuted?
A. Yes, that is exactly what I thought.
Q. And, isn't it fair to say that that is why you cooperated and you spent hours with Mr. Kendall putting aside any civic obligation you might have had because you were basically not being prosecuted for your illegal activities?
A. I would have to say yes.
Q. Now, you appeared at the London trial and were asked a question about rent by Mr. DiMento and you denied that you paid rent; you went back home to Florida, is that fair to say?
[49] A. Yes.
Q. Then you were brought back by the Government because it appeared that you had lied?
A. My lawyer told me to come back, the Government wants to talk to you and tell him the truth.

Q. And, again, did you ever raise that issue that you had an agreement with the Government that you would not have to testify about paying rent?
A. I brought it to my attorney's attention. I don't know who he was supposed to speak to legally. I left it up to him.
Q. Do you recall if that issue was raised in court before the Judge?
A. I don't believe it was raised before the Judge. Maybe it was; I don't remember if my attorney did it or not. He did it the last time we were here.

THE COURT: But, before April 8 during the London trial --

THE WITNESS: No, I don't think he mentioned it. But, I mentioned it to him.

MR. WYSHAK: Thank you, Mr. Lewis, I have nothing further.

MR. GOLDINGS: By redirect, I ask that the Government produce and be made part of the record the Dembin transcript and the last two pages that the witness was asked **[50]** to read from the Grand Jury, and I believe it was January of 1988, and the Pearlstein transcript which it also was used. I think they should be made part of the record. This is a sealed proceeding, so I don't think there is anything wrong about it. Because I think they show in context the argument that in fact these questions weren't asked until a Grand Jury asked him. Then the document speaks for itself as to how that was handled in the Dembin.

THE COURT: The Grand Juror in the Dembin asked who he was gambling with.

MR. GOLDINGS: Well, I have never seen this before, but there was a question --

THE COURT: Is there any objection to that?

MR. WYSHAK: I have no objection, Judge.

THE COURT: We will make the Dembin January 1988 Grand Jury transcript 1 and the Pearlstein transcript, the date of which is what, 1991?

MR. WYSHAK: January 8, 1991.

MR. GOLDINGS: Thank you, your Honor.

THE COURT: Those will be exhibits. They will be Exhibit 2, and the other -- the question by Mr. Wyshak and Mr. Kelly -- at least that was covered is already part of the record as Exhibit F to Mr. Goldings' submission.

MR. GOLDINGS: That is all I would have on redirect, your Honor.

[51] THE COURT: Mr. Lewis, I have a couple of questions for you with counsel. If they think they are not proper questions, they shouldn't be timid about objecting.

If I order you to answer all questions, including questions about who you paid rent to before the Grand Jury, will you answer the questions?

THE WITNESS: No, your Honor.

THE COURT: Why not?

THE WITNESS: Why won't I answer the questions?

THE COURT: Yes.

THE WITNESS: I just don't think it is the right thing to do for me.

THE COURT: Why?

THE WITNESS: Well, many, many reasons.

THE COURT: What are the top two?

THE WITNESS: I am an honorable man.

THE COURT: A standup guy?

THE WITNESS: All right.

THE COURT: Is that concept you want to convey to me?

THE WITNESS: -- yes.

THE COURT: In other words, you believe that it would be dishonorable to give that information and possibly --

THE WITNESS: That is part of it.

[52] THE COURT: And possibly incriminate somebody else?

THE WITNESS: And, what --

THE WITNESS: That is the whole thing, I guess. In essence, that's it.

THE COURT: So, you are not sitting here contending that you have fear for yourself or your family that is influencing you not to answer?

THE WITNESS: No.

THE COURT: Do those questions suggest any further questions to counsel?

MR. GOLDINGS: In addition to the answer he gave as to being an honorable man, do you feel you still have an understanding with the Government --

THE COURT: I am sorry to interrupt you. I was asking if I ruled against it

MR. GOLDINGS: That is No. 1.

THE COURT: No, I asked him, if I were to ask him, if I ruled against him, would he reply, and he said no.

THE WITNESS: I understood the question.

THE COURT: Mr. Lewis -- is it going to be necessary to hear from Mr. Pearlstein?

MR. GOLDINGS: I thought it was pretty narrowly -- I think we are pretty close on the facts. And, if that is going to be part of the record --

THE COURT: Mr. Lewis, don't go too far.

[53] THE WITNESS: The men's room over here.

THE COURT: That's fine.

MR. GOLDINGS: He knows where to go in the courthouse.

MR. PEARLSTEIN: If I had him as a witness I would ask him some questions, but I am content, really, with the paragraphs 4 and 5. It is true that I did not question Mr. Lewis, and I was aware that Dembin had refrained, he gives reasons and --

THE COURT: Well, he is standing there looking in the window. We are going to have to figure out what to do with him.

MR. GOLDINGS: I am sure your Honor will not be persuaded by his statement whether an agreement existed or not. It is the underlying facts as to whether an agreement is made as a matter of law. It is self-serving for either party, I suppose. That is for your Honor to decide.

THE COURT: I think so. If you are content to have me rely on the Dembin affidavit and Mr. Pearlstein's affidavit and Mr. Lewis' testimony, that will conclude the evidence.

MR. GOLDINGS: I think that I am.

THE COURT: Is there any further evidence that the Government wishes to present?

MR. WYSHAK: No, your Honor.

[54] THE COURT: Mr. Pearlstein, it has been determined that it is not necessary for you to testify.

MR. PEARLSTEIN: Okay.

THE COURT: We are going to rely on your affidavit. I am sorry that it took so long. I appreciate your being available.

MR. PEARLSTEIN: Sure.

THE COURT: Is there some further argument you would each like to make? I guess I would hear first from Mr. Goldings and then from the Government.

MR. GOLDINGS: I would like to briefly summarize what I think the facts are that make what I think is a Massachusetts and Federal, if there is federal law of contracts, contracts which I think we might have called an oral contract which is proof and maybe a contract implied in fact. If one is to get very technical and in Corbin or in Williston on what a contract is.

I believe there was an understanding reached and an offer in the sense by Mr. Lewis that he would testify -- in the interviews if the Government would stay away from one subject matter. I believe the Government agreed to stay away from one subject matter, at least by their actions, if not by the words that anybody five years from the events recalls. And, that

action is not just on one occasion but on a multiple of occasions by at least two and no more than three **[55]** United States Attorneys. And, that I think is evidence in every contract sense that that was the result of a meeting of the minds on that issue. And, therefore, I think that we have made out the essence of a contract, the exact and precise terms of which adopt aren't all explicit, but enough of the contract is there for your Honor to imply certain terms under Massachusetts or Federal contract law.

And, the one term I think that is necessary to imply that is really a critical one is for how long is the Government, if I am right, that there is a contract, how long is the Government required to honor its side of the contract. And, I say it is required to honor it at least as long as the Grand Jury subject matter of the Grand Jury investigation remained in effect. Otherwise it is of no meaning to Mr. Lewis, no value to Mr. Lewis to have this contract. And, it isn't a contract if the Government can turn if off and breach its part of it at any time in a foreseeable period of time and reasonable period of time.

The Government's argument appears to be that there wasn't a contract. But, I say our facts are persuasive and I think on any standard of proof meet that requirement and that the Government, however, could when it gets to different priorities in its investigation can renege. And, it says that in the Government's paper that we didn't focus on the payment issue they say of rent in the first two or three **[56]** instances. But, eventually we have to focus, we do want to focus on it, and that is why we want him back today.

Your Honor is very eminently qualified to evaluate whether that's the real reason. And, I want to suggest with all due respect, it isn't the real reason that they are calling on him. The reason reason, I suggest, that they want to renege on the contract is that because of what Mr. DiMento did in the London case. I think they are somewhat embarrassed, they are embar-

rassed, perhaps. I don't think unnecessarily by the laying off of this issue and that their concern --

THE COURT: Well, as a practical matter -- well, go ahead.

MR. GOLDINGS: They are concerned that Mr. Lewis, if he is ever a witness in any other context, he will be questioned don't you have a deal with the Government and haven't they laid off it. I am suggesting to the Government that their are way out of it is, yes, we did make an agreement with them and own up to it. Not that we are going to hold him in contempt to prove that we had --

THE COURT: I asked Mr. Wyshak this on April 8 because I -- you have now put a different interpretation on it, but I wondered was he possible put in this at risk of contempt because the Government was dissatisfied with his testimony in the London trial --

[57] And Mr. Wyshak represented to me, and I haven't understood it to be in dispute that they really are doing an aggressive investigation of rent payments and that Mr. Lewis' testimony is relevant. And, I haven't had a reason to doubt that yet.

MR. GOLDINGS: Well, it is pretty hard for me, aside from citing newspaper articles, they have plenty of other newspapers, I don't have the ability to provide evidence on that.

But there's two other factors that I would like to refer to.

THE COURT: But, basically, Mr. Wyshak, does that remain true, that there is an investigation to which Mr. Lewis' truthful testimony would be relevant and --

MR. WYSHAK: Absolutely, a very significant investigation.

MR. GOLDINGS: I can only take that representation. If there is a contract and it is an enforceable contract, they have to live with that contract even at the detriment of that very important investigation.

THE COURT: Let me ask you a question, and it is at one level technical and one level practical. I haven't looked it up. But ordinarily in Massachusetts contract that can be performed within a year have to be reduced to writing under the statute of fraud. And, you are a good lawyer and **[58]** careful lawyer in my experience. And you have frequently been the signatory of written agreements that replace or probably supplement your compulsion order.

Why, if this was so important when it is foreseeable or indeed occurred that there might be an Assistant United States Attorney who was not present at the time which you characterize as the agent of the contract, didn't you get them memorialized in writing?

MR. GOLDINGS: First, I don't think it needs to be under the statute of fraud because it is an effective employment contract and it could have been performed in a year if Mr. Lewis had died.

THE COURT: In fact, I would rely on it because if the Government made oral representations that would make it -- that would otherwise have the effect of a contract to be written down. And, it was unfair to relieve them of the burden of those promises, I wouldn't for that reason. But, I am looking at it. If there is an agreement that is important to your client's participation and ultimately to his exposure, why wasn't it written down?

MR. GOLDINGS: The answer is, first of all, there was trust by me. I don't know how many United States Attorneys are going to succeed. But, certainly there was trust and justifiable trust because the Government complied with the contract in '87, in '88 and indeed in 1992 up until **[59]** Mr. DiMento's action.

And, the second reason is in my judgment and it is a reasonable judgment that that contract, that agreement, was probably one in which it was not in the interests of either party to put it in

writing if it was ever to be disclosed under 3500 or Brady or other circumstances.

THE COURT: Well, as a practical matter, that raises another question because I think if I go back to my notes I will find that Mr. Lewis was questioned about his agreement with the Government in the London trial on direct and, otherwise, and asked whether there were any other promises or inducements. And, he didn't describe this as part of an agreement or promise or inducement for his cooperation.

MR. GOLDINGS: I would bet that the question was about the immunity agreement. But, I think the answer is, your Honor, when one takes the steps as a lawyer that is necessary for the moment. If you ask me why I didn't raise it during the contempt proceeding and I thought, and the perjury proceeding, it was my view that the most important thing was to have him perjure himself or to recant the contempt. And, as a practical matter, succeeded with regards to -- two strikes as your Honor says it, and it is a tactical decision not to raise every issue that might be raised if you are winning on what you raised. That doesn't mean that the contract and the understanding wasn't there. It simply **[60]** wasn't asserted. My brother makes something of him not coming out of the Grand Jury five years later when he says he was shocked by the question and asked his lawyer about that. I think that is asking a lawyer an awful lot five years later and I don't think any inference can be drawn from that.

Interestingly enough, I think the best evidence of the fact that there was an agreement is how the Government honored it up all through the years up through and including the direct examination in the London trial.

THE COURT: But, the essence of their position is that, in effect, Mr. Lewis, it seems to me Mr. Lewis said: I don't want to say whether I paid rent. I don't want to say who I am working for now.

Given the investigations and prosecutions then being conducted, those issues were not relevant or important. So, rather than have a necessary litigation to get information that they were not interested in for then present purposes, they didn't ask those questions and precipitates that context. Nor, did they waive their right to do so. That is their position.

MR. GOLDINGS: I don't think that is their position. Mr. Dembin said he was aware that at the time of the Lewis interview, that is 1988, January, that the Strike Force was investigating allegations about paying rent. So, the Government suggested today that they are now focusing on a **[61]** new matter and shouldn't be bound --

THE COURT: What is this?

MR. GOLDINGS: Page 2 of the Dembin -- paragraph 5, he says: I was aware at the time of the Lewis interview -- that is January '88 -- that the Organized Crime Strike Force was investigating allegations that bookmakers were being required to pay rent to various reputed Organized Crime figures. That was known then. This was nothing new.

THE COURT: Paragraph 6, is that how the issue came up?

MR. GOLDINGS: Paragraph 5.

THE COURT: No, but look at 6.

MR. GOLDINGS: 6. Yes. I thought the thrust of the Government's argument was that the regular U. S. Attorney's office was giving him a pass in 1988. But, now the Strike Force, or whatever it is, the new regime wants to go into a new area, or that it was an area, that there was a wall of separation in the two parts of the office and they didn't talk to each other.

THE COURT: Is that your position, Mr. Wyshak?

MR. WYSHAK: No.

THE COURT: But, I didn't understand that to be the decision.

MR. GOLDINGS: I point out paragraph 5, these were two parties, not with the same bargaining position, I might **[62]** say, both of whom had full knowledge of what they were giving away and what they were getting by the agreement we allege. And, I don't think there is any circumstances that justify the breach of that agreement because now it is asserted that there is something very relevant about this evidence in a new investigation.

I am sorry that that is so and all that. But I think they should meet their agreement. And, I don't think there is any change in circumstances based on the Dembin affidavit that justifies saying there is a new deal and justifying a breach of understanding. So, that is my assertion and that is my argument.

THE COURT: What do you say that he did in reliance on this understanding, the consideration that he cooperated and was interviewed because all he was obligated to do pursuant to the order was show up in the Grand Jury and show up to the court?

MR. GOLDINGS: And, those interviews were ample. He became the in-house expert on gambling terms. And, that is over and above the -- immunity order and this is -- for consideration.

THE COURT: Mr. Wyshak?

MR. WYSHAK: On that last point, I just put it right to Mr. Lewis, why wasn't it that he cooperated and showed up, and I think it was his testimony under oath because he didn't **[63]** want to be prosecuted and he understood that the immunity order was protecting him from prosecution.

THE COURT: Well, it is a little more important, settling I mean. I don't known how sophisticated his understanding was. The more he told the Government, the stronger his immunity.

MR. WYSHAK: I think as a practical matter even a layman understands that although the immunity order does not techni-

cally protect him from prosecution. As a practical matter, it is very difficult to prosecute somebody that has testified before the Grand Jury and been in numerous interviews. Not that it can't happen, but as a practical matter it doesn't.

But, as I put it to the Court that that is the real reason why Mr. Lewis was cooperative because he has got a past on a lifetime of criminal activity. But, getting back to the real issue here, I've looked at this, I have been aware of this for quite a while because it did come up earlier when Mr. Lewis appeared in the Grand Jury in which Mr. Kelly and I were involved. And, I think what you have here is a situation where the Government armed with an immunity order which grants them the authority to make Mr. Lewis testify to everything that was relevant concerning the ongoing Grand Jury investigation refrained, not because there was any contractual agreement between the parties but **[64]** refrained because it was an area that (a), was not that pertinent to the ongoing Grand Jury investigation as your Honor knows.

The Strike Force investigation at the time of rent collection was targeting Ferrara and Russo through the LCN group. And, I am sure, as your Honor understands, Mr. Lewis was paying the Winter Hill group, a group who was under investigation.

Further, Mr. Dembin's Grand Jury was a money laundering case that your Honor has sat on. And, a prosecutorial decision was made that rather than embarrass the witness or make the witness uncomfortable, that subject matter is not that important, that the Government wanted to create a problem for the witness.

But, I do say that that is a far cry from actually entering into any kind of binding agreement. And, I submit to the Court that the fact that there is no such binding agreement either (a), on the record in the Grand Jury or (b), in written form is testament to the fact that there was no such agreement.

Mr. O'Sullivan, I doubt very much if Mr. O'Sullivan or Mr. Dembin would have ever put down in writing that we will never question Mr. Lewis about this subject matter. As a matter of fact, it is not an agreement that the Government can even enter into because assuming the witness was going to **[65]** testify at a trial, we could never protect the witness from being examined.

THE COURT: It is not an agreement that the Government can ever properly enter into. But if an assistant exceeded his authority, I think the Government would still be bound by that excessive conduct. Here Mr. Dembin said he wouldn't ask about these things, but I think the facts are not all that much in dispute, the implications have to be determined. And, I will let you argue a bit more, although I have got some people waiting. And, then I am going to recess and decide the matter for you before you leave.

MR. WYSHAK: I would just suggest to the Court, if you look at the case law it is the witness' burden to show just cause. And, if you look at the line of cases, the only cases which really support proof of just cause is a line of cases regarding the Government's use of electronic surveillance. And, another line of cases regarding abuse by the Government and setting perjury traps and the like. I don't think that --

THE COURT: Actually, Mr. Goldings had --

MR. WYSHAK: Well, I am getting to those.

The cases that the witness relies on are really cases in which there is a contractual agreement between the parties such as plea agreements, such as cooperation agreements.

[66] THE COURT: I agree. As a practical matter, the context is different than Santobello and its -- although if there is an agreement, the Santobello type of principles apply and then you have to observe it in good faith. But here we are one step before that because the question is: Is there some kind of enforceable agreement?

MR. WYSHAK: And, it is the Government position that what happened in this case was not an agreement in good faith, was not an agreement of faith of Santobello or any of the cases upon which the witness is relying upon. Rather, it was a forebearance by the Government, but in order to make it easier for the witness to testify, not create a confrontational situation with the witness but a situation -- that does not rise to the level of a contractual agreement.

And, I think the proof of the pudding is that when Mr. Lewis came in to testify in 1992 and those questions that he claims that he had an agreement that he would not have to answer were asked of him, rather than relying on this agreement, he chose to lie.

If he really had an agreement and he was represented by Morris Goldings at the time, the appropriate thing for him to do would have been for him to refuse to answer the questions based upon the agreement. And, then if we sought compulsion -- but Mr. Lewis did not do that. He chose to lie and the reason is because he had no agreement, he really had